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Consequences of Cluster Munitions on the rights of the child

A child rights-based approach to the implementation of the Convention
on Cluster Munitions

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List of Abbreviations

AOAV	Action on Armed Violence
AP	Additional Protocol
APMBT	Anti-Personal Mine Ban Treaty
AXO	Abandoned explosive ordnance
CAT	Convention against Torture
CCM	Convention on Cluster Munitions
CCW	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects
CEM	Combined effects munitions
CRBA	Child rights-based approach
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
cTBI	Closed traumatic brain injury
DPICM	Dual-purpose improved conventional munitions
ERW	Explosive Remnants of War
GA	General Assembly of the United Nations
GCs	Geneva Conventions
GICHD	Geneva International Centre for Humanitarian Demining
HEAT	High Explosive Anti-Tank
HRL	Human rights law
IAC	International armed conflict
ICC	International Criminal Court

ICCPR	International Covenant on civil and political rights
ICESCR	International Covenant on economic, social and cultural rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDPs	Internally displaced persons
IHL	International humanitarian law
ILO	International Labour Organisation
IMAS	International mine action standards
ISU	Implementation Support Unit
LGBTIQ	Lesbian, gay, bisexual, transgender, intersex, queer
MRM	Monitoring and Reporting Mechanism
NGO	Non-governmental organisation
NIAC	Non-international armed conflict
NSAG	Non-state armed groups
OP	Optional Protocol
PCS	Post-concussion syndrome
PLP	Phantom limb pain
pTBI	Penetrating traumatic brain injury
PTSD	Post-traumatic-stress-disorders
SC	Security Council
SCWG-CAAC	Security Council Working Group on children and armed conflict
SP	State Parties
SP/RLP	Stump/residual limb pain
SRSR-CAAC	Special Representative of the Secretary General for children and armed conflict

TBI	Traumatic brain injuries
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNICEF	United Nations Children's Fund
UNSG	United Nations Secretary-General
UPR	Universal Periodic Review
UXO	Unexploded ordnance
VAP	Vientiane Action Plan
WHO	World Health Organization

Abstract

This thesis aims at illustrating the impacts of Cluster Munitions on the rights of the child and at developing a new approach based on the full enjoyment of children's rights when implementing the Convention on Cluster Munitions. Due to their natural curiosity, their small bodies and the proximity of the vital organs to the blast of explosive weapons, children account for 46% of all Mine and Explosive Remnants of War casualties, including Cluster Munitions. Despite their specific vulnerabilities and changing needs, the rights of the child are too often disregarded by states and other relevant stakeholders.

Before providing an overview on the relevant international legal and institutional framework in the area of humanitarian law, human rights law and the United Nations normative and policy framework, this paper analyses the impacts of Cluster Munitions on children, not only regarding physical and psychologic implications but also concerning the access of victimised children to healthcare, education and humanitarian assistance as well as social, economic and environmental consequences, diseases and displacement.

The core of the thesis is constituted by the fourth chapter, dealing with the application of the Convention in theory and the elaboration of a child rights-based approach putting children at the centre of all considerations when implementing the legally binding obligations deriving from the Cluster Muniton Convention, humanitarian and human rights law. In addition, recommendations and measures to be taken in key areas of action relevant for the protection and promotion of the rights of the child complement the paper.

1. Introduction

Children are one of the main victims of Cluster Munitions but they are not even mentioned explicitly in the so called Vientiane Action Plan (VAP). This Plan identifies concrete actions concerning the implementation of the obligations of the State Parties (SP) to the Convention on Cluster Munitions (CCM) which itself refers to children only in its Preamble. Therefore, the following thesis deals with the impacts and consequences of Cluster Munitions on children, in particular physical, psychological, social and economic implications as well as related issues such as disabilities, access to health care, education, humanitarian assistance, displacement and the environment. It aims at providing an overview of the international legal and institutional framework in the field of international humanitarian law (IHL), human rights law (HRL) and the normative and policy framework of the United Nations (UN) directed towards the protection of children in armed conflicts and post-conflict settings. In this regard this paper tries to examine child rights related obligations of the states who ratified the CCM, the implementation process of the Convention from a child rights-based perspective and the concrete steps the states need to take so as to implement their obligations in a child rights sensitive manner. In order to respond to the impacts of Cluster Munitions on children in a multidisciplinary way, states have to address the different needs and vulnerabilities of children affected by these weapons and to enhance their domestic competences and capacities. Furthermore, this piece of work offers recommendations preventing children to become victims of Cluster Munitions and suggests practical ways on how to reintegrate child victims into the society, to avoid exclusion, to guarantee their rights and to carry out child sensitive victim assistance.

1.1 Aims and Scope

The CCM is a relatively young Convention. Many significant research findings and statistics have already acknowledged the severe impacts of Cluster Munitions on children and their specific vulnerability because of the fact that these weapons look like

toys, which leads to the problem that children are not aware of the danger Cluster Munitions and other Explosive Remnants of War (ERW) pose; they are often not conscious of warning and information signs and because of the severe injuries they cause to their undeveloped and small bodies.¹ However, there is no special approach exclusively focusing on children in this regard. Hence, the present thesis can be valuable by defining a child rights-based approach (CRBA) to the implementation of the Convention as well as by making the topic more visible.

Therefore, the aim of the paper is to elaborate such a CRBA to the implementation of the CCM. Thereby is intended to provide a definition of the approach and which main elements it should include as well as to recommend concrete measures to be taken by the SP to the Convention. The existing legal and medical studies on the impacts of Cluster Munitions on children will contribute to the formulation of concrete child sensitive actions and measures.

So far, there is available research on the CCM in general and little on the VAP as well as on the impacts and consequences of Cluster Munitions, but there is hardly any information focusing on the issue of children. Until now, this subject was dealt with in the context of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (APMBT) and also in regards to ERW, but children are of little interest when it comes to the CCM. By making the topic more visible, the thesis hopefully contributes to the protection of the rights of the child when it comes to the use of Cluster Munitions. In this regard, some practical steps and guidance for the SP and the fieldwork on how to implement the Convention in a child sensitive manner which takes into account the consequences of Cluster Munitions on children and the society they live in should be provided. Also, by offering some recommendations and actions, the thesis can add some input and value to the existing research on that topic.

¹ Office of the SRSG-CAAC, Landmines, Cluster Munitions, and Unexploded Ordnances, at <https://childrenandarmedconflict.un.org/effects-of-conflict/landmines-cluster-munitions-and-unexploded-ordnances/> (consulted on 8 July 2015).

1.2 Research Context and Questions

Main questions of the following thesis are:

How are children affected by Cluster Munitions? What does it mean for their lives to live in a Cluster Munitions affected society and how can the SP of the CCM implement their obligations resulting from the Convention with the objective of guaranteeing and protecting the rights of the child?

In order to answer the main questions, the following sub-questions have to be considered:

What are the child-rights related obligations of the SP of the CCM? Which mechanisms and tools are in place to implement the CCM? Do they take the rights of the child into consideration? What is the status and legal level of protection of children in armed conflicts? How can the CCM be implemented in a child-sensitive manner? Which steps, measures and activities should be taken by the SP?

The overall approach of this piece of work is a legal approach based on a descriptive and a normative research. Furthermore, it includes approaches of other disciplines such as social sciences. With the purpose of answering all these questions, the paper draws upon the existing legal and institutional framework, research done in the field of Cluster Munitions as well as IHL, HRL and legal, medical and social studies conducted concerning the impacts and consequences of Cluster Munitions on children.

1.3 Methodology

The present thesis primarily applies a legal methodology but also follows a multidisciplinary approach by taking into account social sciences techniques and dimensions, especially when dealing with the impacts and consequences of Cluster Munitions on children in its second part. Thus, it provides an explanation and understanding of social phenomena, in particular of the effects and implications of Cluster Munitions on children living in a Cluster Munitions affected society.

The third part is mainly a descriptive/doctrinal research where the existing international and institutional framework in the field of IHL and HRL as well as the UN normative and policy framework are analysed and where the child rights related obligations of the SP of the CCM are examined.

The fourth part, on the other hand, is more normative/non-doctrinal, in which the utilization of the law by states when implementing their obligations by applying a CRBA is described. This part, as well as the conclusion, shows how the law and the implementation process could work in practice by identifying measures to be taken when implementing the CCM in a child sensitive manner. Additionally, a quantitative research method is undertaken in the second part, based on numbers and figures concerning the implications of Cluster Munitions on children. Both approaches are appropriate to describe and to illustrate the situation in the field. The data analysis is based on already existing research, databases and human rights reports but put into the context of the topic of the paper.

1.4 Structure

After a short introduction and the definition of relevant terms in part one, this paper, deals with the impacts and consequences of Cluster Munitions on children in the first place. In this matter, the thesis primarily covers child victims and various socio-economic as well as physical and psychological implications of Cluster Munitions on children. Therefore, it also takes into consideration some medical studies on that issue and provides some figures and tables to illustrate the dimension of the situation of children affected by Cluster Munitions.

In a third part, this piece of work conducts a legal analysis of the existing international and institutional framework especially with regards to the use of weapons under international law as well as the fundamental principles of IHL, the CCM and the main obligations of the SP. Furthermore, it discusses the status of children in armed conflicts. In this respect, the Geneva Conventions (GCs) and the Additional Protocols (APs) and their system of general and special protection of children is examined. Concerning

international HRL it focuses on a) the Convention on the Rights of the Child (CRC), the Optional Protocols (OPs) of this Convention as well as the General Comments of the Committee of the Rights of the Child and b) on the child specific provisions of the Convention on the Rights of Persons with Disabilities (CRPD). In order to provide a full picture, it also emphasises the normative and policy framework of the UN in the context of children in armed conflicts.

The main part of this paper covers the implementation of the CCM in theory and in practice. Therefore, it analyses the main mechanisms to implement the CCM as well as the VAP and the actions relevant for the fulfilment of children's rights. Furthermore, it defines a CRBA to the implementation of the CCM by pointing out the key elements of such an approach as well as by identifying the main areas in which measures should be taken by the SP in order to guarantee the full enjoyment of the rights of the child.

Finally, the principal findings and the elaboration of specific recommendations and actions to be taken by the SP complete the thesis in its conclusion. Hence, it also includes a prospective analysis and a possible way of implementing the CCM.

1.5 Definition of Terms

Before dealing with the impacts and consequences of Cluster Munitions on children, some relevant terms and concepts have to be defined.

1.5.1 Children and Adolescents

According to Article 1 of the CRC and based on the principle of majority, incorporated in most of the international legal systems, a child is defined as “human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”². When it comes to the beginning of childhood the CRC does not offer a

² Article 1 UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNTS, vol. 1577, I-27531.

definition. Before reaching majority, childhood is characterised by dependencies on others and limited legal rights. In this first influential period of life most of the developments of one's personality and abilities occur. Therefore, a distinction between children (0-12 years) and adolescents (13-18 years) is crucial in order to equalise their different needs for self-determination, empowerment, independence and involvement which is essential for their individual development. On the other hand, it is also important to consider their specific vulnerabilities and needs for protection.³ For the purpose of the thesis, children in a broader sense will be defined as human beings from the moment of birth until the age of eighteen years. Thereby is not intended to interpret the CRC in a way that excludes children as right-holders before the moment of birth but the idea is to follow a practical approach. Once they are born, they can become independently victims of Cluster Munitions which allows a better analysis of the specific impacts of Cluster Munitions on children. Furthermore, a distinction between children and adolescents is applied with the aim of illustrating the situation in a more differentiated way. It is of utmost importance to identify target and age groups in order to adapt actions to the changing needs of each age group and to address the immense differences between the broader group of children. Depending on the specific context, measures and actions to be taken by the SP have to be age sensitive and to take into account gender dimensions so as to overcome still prevailing gender-based stereotypes.⁴

1.5.2 The concept of vulnerability

When it comes to armed conflicts, children are especially vulnerable. Although there is no agreed definition on what constitutes a vulnerable group, vulnerability can be referred to as continuous, universal and integral to the human condition.⁵ With regard to the Oxford Dictionary, the word 'vulnerable' can be defined as "exposed to the possibility of being attacked or harmed, either physically or emotionally" or "in need of special care, support, or protection because of age, disability, or risk of abuse or

³ Sax, 2012, pp. 422-432.

⁴ Idem., pp. 422-432.

⁵ Fineman, 2008, p. 1.

neglect”⁶ and is thus often related to stereotypes such as victimhood, dispossession or dependency.⁷ It is a concept depending on various circumstances and events such as natural disasters, diseases, economic and institutional destructions, social settings, geographical locations and characteristics of a certain group. Some of these social groups, including children, women, refugees, elderly, lesbian, gay, bisexual, transgender, intersex, queer (LGBTIQ), displaced and disabled persons, tend to be more affected by such circumstances.⁸ In the context of HRL, international treaties such as the CRC, try to pay special attention to the needs of the above mentioned vulnerable groups. Hence, there is a close link between human rights and the concept of vulnerability when it comes to the issue of inequality, exclusion and access to participation.⁹

1.5.3 Human Security

Related to vulnerability, human security is a concept that focuses on the security of people and their well-being and safety rather than on the security of states and borders. It is considered to encompass the recognition of the linkage and the reinforcing power of development, peace, security and human rights. The definition of human security is still controversial and doctrines are divided between a narrow and a broad approach to human security, focusing on the human rights and on a development agenda. In the past years, international crises led to a change of the security approach from state-centric to people-centred, meaning the personal protection of communities and civilians of gross human rights violations and armed conflicts rather than just aiming at victim assistance. By applying a human security approach, vulnerable groups, such as children, and the promotion of human security, especially in the context of armed conflicts, are at the centre of consideration. It aims at the protection of people regardless of their race,

⁶ Oxford Dictionaries, Language matters, Vulnerable, OUP, at <http://www.oxforddictionaries.com/definition/english/vulnerable> (consulted on 8 July 2015).

⁷ Fineman, 2008, p. 8.

⁸ FRAME, Fostering Human Rights Among European Policies, Report on the survey study on human rights violations in conflict-settings, D10.1, 2014, p. 13.

⁹ Peroni & Timmer, 2013, pp. 1056-1062.

religion, age, gender, political opinion or other background and seeks to achieve this by protecting and empowering people. Therefore, a human security strategy has to be adapted to the needs and capabilities of the target group. Taking into account a human security approach which puts the protection and empowerment of children at the centre of consideration contributes to the fulfilment of their fundamental freedoms and the guaranty of a life in dignity.¹⁰ Hence, the present thesis also tries to incorporate such an approach by identifying the primary responsibilities of the states to implement a caring structure with regards to Cluster Munitions in order to protect children from emanating threats thereof (top-down approach). Additionally, children should also be empowered to develop their ability to deal with Cluster Munitions and to act on their behalf (bottom-up approach).

1.5.4 Explosive Remnants of War

Article 2 of Protocol V on ERW to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (CCW) defines ERW as unexploded ordnance (UXO) and abandoned explosive ordnance (AXO). Mines, which are munitions designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person (antipersonnel mine) or a vehicle (antivehicle mine),¹¹ are clearly not included by this definition. These weapons are covered in particular by the APMBT and CCW (Amended) Protocol II, but are not focused on in this paper, although parallels can be drawn concerning certain issues. When talking about AXOs and UXOs, the protocol means explosive ordnance (conventional munitions containing explosives, with the exception of mines, booby traps and other devices) that has not been used during an armed conflict but has been left behind or dumped by a party to an armed conflict, and which is no longer under control of the party that left it behind or dumped it and may or may not have been

¹⁰ Churruga, 2007, pp. 15-35.

¹¹ Art 2 UN Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) UNTS, vol. 2056, I-35597.

primed, fused, armed or otherwise prepared for use (AXOs) and explosive ordnance that has been primed, fused, armed, or otherwise prepared for use and used in an armed conflict and which may have been fired, dropped, launched or projected and should have exploded but failed to do so (UXOs).¹² Military weapons, ammunition and equipment are meant by referring to munitions,¹³ whereas submunitions are any munition that, to perform its task, separates from a parent munition such as Cluster Munitions. They are either called bomblets when airdropped or grenades when ground-launched. If they fail to explode, these submunitions are considered to be UXOs, also called duds.¹⁴ ERW can be seen as an all-encompassing term for the above mentioned explosive devices besides mines. When remaining on the ground because of the failure of explosion, they cause major amounts of civilian casualties in armed conflicts and post-conflict settings by killing and maiming indiscriminately. Especially children are likely to become victims of these weapons, which are not only creating requirements for assistance but also causing huge financial burdens when it comes to their removal as well as severe economic, environmental and social consequences for the affected communities. Those impacts are discussed later on in the present thesis.¹⁵

1.5.5 Cluster Munitions

Cluster Munition, as defined by the CCM, is a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions. The definition does not encompass munitions that dispense smoke, flares, chaffs or electronic effects as well as pyrotechnics, mines or nuclear and biological weapons.^{16, 17} Cluster Munitions are either air-dropped, ground-

¹² Art. 2 Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol V) (adopted 28 November 2003, entered into force 12 November 2006) UNTS, vol. 2399, A-22495.

¹³ Handicap International, Circle of impact, 2007, pp. 7-8.

¹⁴ Landmine and Cluster Munition Monitor, Cluster Munition Monitor 2014, 2014, p. vii.

¹⁵ Watts, 2009, pp. 218-219.

¹⁶ Art 2 UN Convention on Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010) UNTS vol. 2688, I-47713.

¹⁷ Handicap International, Circle of impact, 2007, p. 7.

or sea-launched with the objective of releasing multiple free-falling submunitions or respectively bomblets, grenades and dual-purpose improved conventional munitions (DPICM), comprised in a dispenser, container or parent munition (delivery system) and are intended to detonate, at impact or in delayed mode,¹⁸ over a widespread zone and to destroy armour (High Explosive Anti-Tank (HEAT)¹⁹), kill people, or both (combined effects munitions (CEM) with an additional destroying feature²⁰ or DPICM²¹).²² The area affected by Cluster Munition can be as extensive as 350 meters by 500 meters and is often referred to as footprint.²³ Hence, the specific way of functioning of this weapon system has an enormous potential to cause civilian casualties especially in populated areas over a Cluster Munition strike as a consequence of the virtual impossibility to accurately hit only military targets. Furthermore, as experiences showed, they often fail to explode and therefore become UXOs with similar effects as landmines with enormous implications and impacts during and after a conflict.²⁴

In order to avoid those effects, Cluster Munitions can contain a self-destruction mechanism, an incorporated automatically functioning mechanism in addition to the primary initiating mechanism of the munition which secures the destruction of the munition into which it is incorporated. It can be self-deactivating which means automatically rendering a munition inoperable by means of the irreversible exhaustion of a component, for example a battery, that is essential to the operation of the munition,²⁵ or can use other mechanisms so as to improve the targeting accuracy such as sensor-fused weapons (SFW), the most recent Cluster Munition equipment.²⁶ Despite the occurring use of those advanced technologies, they are, however, unable to solve the humanitarian problems Cluster Munitions induce as a result of the wide area effects and the high failure rates of those mechanisms.²⁷ The latest report of Cluster Munition

¹⁸ Handicap International, Circle of impact, 2007, p. 7.

¹⁹ GICHD, A Guide to Cluster Munitions, 2009, p. 10.

²⁰ *Idem.*, p.10.

²¹ Landmine and Cluster Munition Monitor, Cluster Munition Monitor 2014, 2014, p. vii.

²² *Idem.*, p. vii.

²³ Wiebe, 2000, p. 89.

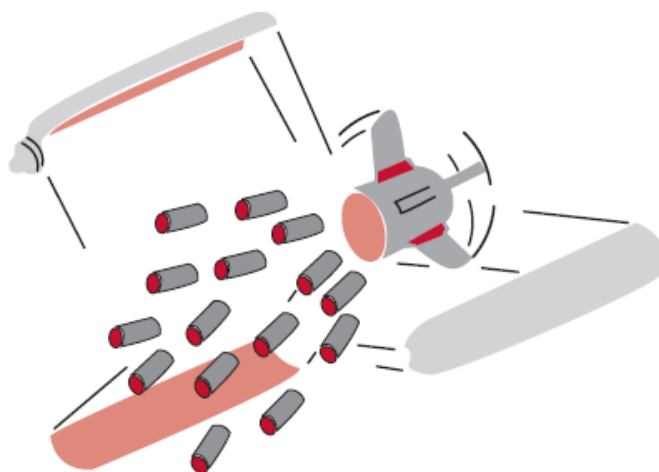
²⁴ Rieder & Choonara, 2012, p. 60.

²⁵ Art. 2 CCM, *op. cit.*

²⁶ Breitegger (a), 2012, p. 17.

²⁷ Borrie & Cave, 2006, pp. 10-12.

Monitor shows that so far 34 states have produced or developed more than 200 different types of Cluster Munitions²⁸ which can be divided into five different categories, based on a) their way of delivery, b) the intended effects c) the contained type of fusing system, d) the inclusion of target identification or guidance mechanisms and e) the insertion of self-destruct or self-deactivation mechanisms.²⁹



Picture 1: Example of an air-dropped Cluster Munition³⁰

Given the huge spectrum of different types of Cluster Munitions it is for the purpose of the present thesis not important to go into further detail.

After dealing with some initial considerations concerning relevant definitions and terms, the following chapter focuses on the implications of Cluster Munitions on children. By providing some facts and figures the problems caused by those weapons should be illustrated.

²⁸ Landmine and Cluster Munition Monitor, Cluster Munition Monitor 2014, 2014, p. 1.

²⁹ GICHD, A Guide to Cluster Munitions, 2009, p. 9.

³⁰ Idem., p. 10.

2. The impacts of Cluster Munitions on children

94% of the casualties caused by Cluster Munitions are civilians,³¹ among those are many children. In terms of the first effect of Cluster Munitions, namely the wide dispersal pattern, children are in general no less or no more prone to get injured than other civilians but there is a specific likelihood that children become victims of unexploded submunitions. This is mainly because of the nature of children to be curious, inexperienced and to explore their environment as well as the shape, size and colour of Cluster Munition remnants and the tendency of children to pick them up and to play with them. Due to their small bodies and the proximity of their organs to the explosion they get severely injured, maimed or even killed more often than adults. Furthermore, victimised children face several more extensive consequences. Besides the constant threat, which limits children in their freedom of movement and to play wherever they please, Cluster Munitions have serious impacts on their family life, if a member of the family dies or gets injured. Moreover, those weapons have numerous economic, environmental and social implications and often restrict the access of children to education and healthcare, due to disabilities.³²

2.1 Primary and secondary effects

When talking about the primary effects of Cluster Munitions on children, it is referred to the direct impacts on them. As already mentioned, children are more susceptible to become victims of Cluster Munitions due to their natural interest, innocence and joy of discovery. Young children are often not aware of the danger Cluster Munition remnants pose or are unable to read warning signs which makes them even more vulnerable. The consequences of an explosion are much worse for children because of their small bodies

³¹ Landmine and Cluster Munition Monitor, Cluster Munition Monitor 2014, 2014, p. 3.

³² Mines Action Canada, Cluster Bombs and Children, at http://www.minesactioncanada.org/peoples_treaty/fact_sheets/en/ChildrenClusterMunitions.pdf (consulted on 8 July 2015).

and the closeness of the vital organs to the detonation. This often leads to the death of children or permanent disabilities caused by serious injuries of the limbs. Blindness and deafness are often the result of children playing with Cluster Munitions. The maintenance of the growth and the adjustment of the prostheses according to it are essential but often neglected. Experiences show that the most innocent suffer the greatest traumas.³³

Secondary effects are indirect effects on children caused by ERW and Cluster Munitions. The presence of unexploded submunitions exacerbates some of the consequences that children already have to suffer from due to armed conflicts such as malnutrition, famine and starvation following the inaccessibility of the farmland as well as other social, economic and environmental implications. Often diseases and epidemics are the outcome which increase the death rates of children in particular. Therefore, farmers regularly take the risk to cultivate and clear their land³⁴ which can result in the injury or the loss of a parent or even both. To experience the loss of a family member has probably the most severe impact on children. During the period of conflict, children all too often suffer psychologically because of the absence of a certain routine which might cause emotional or behavioural disorders. After conflicts, the repatriation of refugees, the delivery of aid, the access to healthcare, water and food are frequently hindered due to contamination caused by the use of Cluster Munitions. Especially girls are affected by limited resources for emergency health care which is habitually in the hands of men and rarely used by women because of various cultural and religious reasons. In addition, the injuries caused by Cluster Munitions very likely demand intensive health care that is often not available or not feasible due to limited funds. Furthermore, the access to education might be hampered, leading to long lasting developmental implications for the child and the affected region.³⁵

³³ Watts, 2009, p. 220.

³⁴ Williamson, 2011, p. 30.

³⁵ Watts, 2009, p. 221.

2.2 Casualties

There are several reasons for children to be affected by Cluster Munitions during and after a conflict. Either it is because of direct traumas or because of the consequences of war such as hunger, famine, diseases and epidemics, as well as the loss of parents.³⁶ According to a research done by the United Nations Children's Fund (UNICEF), two million children have died in the first 10 years of this millennium due to armed conflicts. Another six million have been wounded or lastingly disabled.³⁷ Unexploded submunitions are among the leading factors for child casualties. The exact calculation of child victims and the aggregation of data are very difficult when it comes to children especially because perpetrators try to hide the numbers, the age and gender of the victims, blame others or the necessary data is simply not available because appropriate monitoring is not undertaken.³⁸ Pursuant to the Action on Armed Violence (AOAV) report on explosive weapons, 1.462 children, which are 17% of all the civilian casualties where the age was known, died or were injured only in 2013 due to use of *explosive weapons* in populated areas in 34 different countries. Among all the child casualties, 826 were girls and 49% of the casualties were notified in Syria only.³⁹ The greatest number of child victims worldwide is caused by ERW (57%) whereas Cluster Munitions are *only* responsible for 2% of all the casualties. Boys represent 84% of all the child victims due to their participation in outdoor chores.⁴⁰ Altogether, landmines and munitions are considered to be responsible for the death of around 800 people and disabling around 1.200 people every week and, thus, kill more human beings than nuclear and chemical weapons together.⁴¹

³⁶ Rieder & Choonara, 2012, p. 60.

³⁷ UNICEF, Children in Conflict and Emergencies, at <http://www.unicef.org/protection/armedconflict.html> (consulted on 8 July 2015).

³⁸ Rieder & Choonara, 2012, pp. 60 - 61.

³⁹ AOAV, Explosive Events, 2014, p.20.

⁴⁰ Landmine and Cluster Munition Monitor, The impacts of mines/ERW on children, 2014, p. 1-3.

⁴¹ Fares &Fares, 2013, p. 2095.

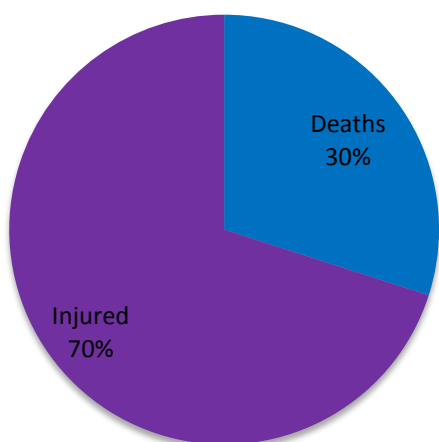


Diagram 1: 1.112 child casualties of ERW/Mines in 39 states and 3 regions in 2013

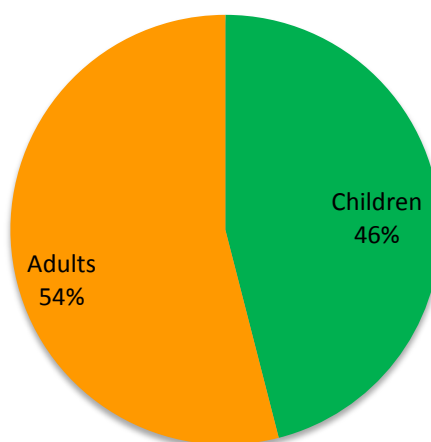


Diagram 2: ERW/Mine casualties by age in 2013. Increase of 8% of child casualties within a year

Democratic Republic of Congo	90%
Yemen	82%
South Sudan	75%
Afghanistan	48%
Somalia	45%
Colombia	35%
Pakistan	26%

Table 1: Highest numbers of Mines/ERW child casualties in 2013⁴²

For many countries precise numbers of child casualties and victims of Cluster Munitions in particular are not available. According to Article 5 (2) (e) CCM, SP to the Convention have to provide the same assistance to ERW and mine victims as to Cluster Munitions victims. Hence, landmine and ERW casualties are often included in the figures and are not accurately differentiated from Cluster Munitions victims.⁴³

⁴² Landmine and Cluster Munition Monitor, The impacts of mines/ERW on children, 2014, p. 1-3.

⁴³ Landmine and Cluster Munition Monitor, Fact Sheet. Global contamination from cluster munition remnants and cluster munition casualties, 2011, p. 3.

However, since the adoption and entry into force of the CCM the collection of data and the reporting of Cluster Munitions victims have improved. So far, Cluster Muniton Monitor could ascertain 19,419 Cluster Muniton casualties, most of them caused by UXOs, in 31 countries, comprising 12 SP to the CCM and four signatories, and three other regions from the mid-1960s until the end of 2013.⁴⁴ This data is also backed by a survey undertaken by Handicap International which confirms 13.306 Cluster Munitions casualties (see diagram 3) in the period from 1965 to 2007, even though estimated casualties range between 56.218 and 64.983. Among those, 7.246 were injured and 5.745 killed by estimated 440 million Cluster Munitions⁴⁵ used in this period.

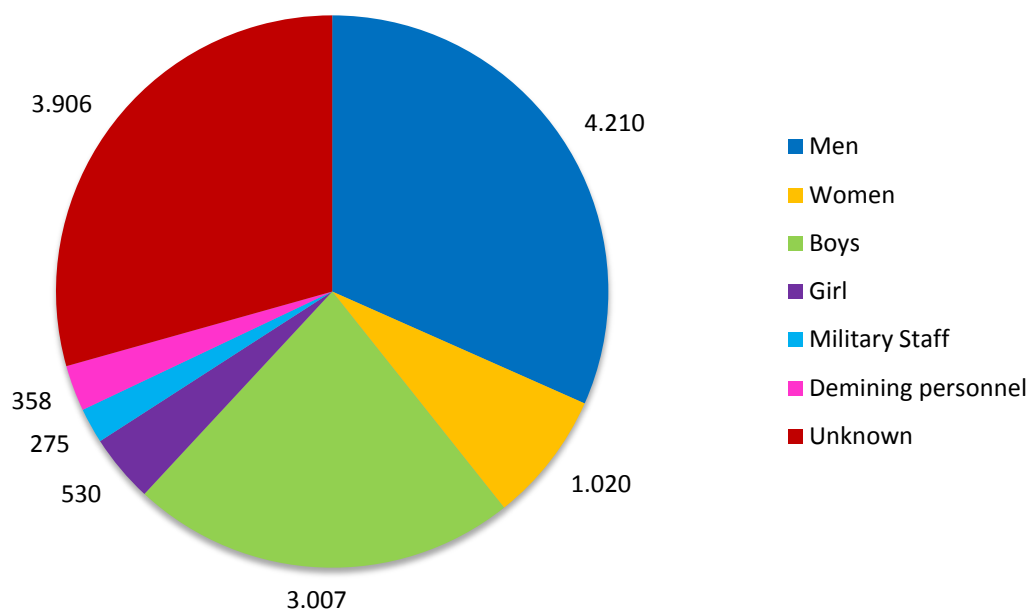


Diagram 3: Cluster Muniton casualties in the period from 1965-2007⁴⁶

For instance, boys under the age of 18, constituted 62.5% of the Cluster Munitions victims in Kosovo in the year following the conflict in 1999. 37.8% of the boys between 6 and 15 were affected by Cluster Munitions in Cambodia, further 50% of Cluster Munitions victims in Lao PDR were children as well as 36.3% in Afghanistan mainly

⁴⁴ Landmine and Cluster Muniton Monitor, Cluster Muniton Monitor 2014, 2014, pp. 41-45.

⁴⁵ Handicap International, Circle of impact, 2007, p. 21.

⁴⁶ Idem., pp. 148-149.

caused by the outdoor chores of boys, the curiosity of children in general and the exploitation of children for the collection of the metal and the substances contained in the UXOs.⁴⁷ In 2013, Cluster Munition Monitor identified 1.001 casualties only in Syria, of which 151 died, 850 were injured and 97% were civilians. Never have so many Cluster Munitions victims been reported in one country within a year. Because of the ongoing conflict, there are no further details on the age and gender of the victims. In at least eight other countries⁴⁸ and the Western Sahara, victims of UXOs have been recorded. More incidents are alleged to have happened in Myanmar and the Ukraine but are not verified. Children, young adults and clearance personnel were mainly affected by those incidents. From six victims in Lao PDR we know that all of them were boys between the age of 5 to 13. One of them died and the others were severely injured. In Lebanon, the only incident involved a young man (18 years) who died when he stepped on an UXO while working in the fields. In Western Sahara a 12-year-old boy lost his fingers due to the explosion of an UXO in his hand, thinking it was a toy.⁴⁹

2.3 Psychological impacts

Cluster Munitions remnants cause fear because they are lying visibly on the ground waiting for somebody to step on them or to pick them up unlike mines which are hidden under the surface. This results in immense mental implications, a feeling of insecurity and reduced economic productivity⁵⁰ of the affected communities. According to studies, mainly children between 10 and 12 and adults above 50 suffer from the permanent threat. Victims of Cluster Munitions often sustain psychological traumas and disorders. Post-traumatic-stress-disorders (PTSD), stress reactions, anxiety disorders and depression due to the loss of limbs are prevalent whereupon adolescents are often affected the most.⁵¹ A study undertaken in Southern Lebanon showed that 65% of child casualties suffered from PTSD. Other psychological consequences particularly

⁴⁷ ICRC, Cluster Munition Victims. What is known and what is needed?, 2008, p. 2.

⁴⁸ Cambodia, Croatia, Lao PDR, Lebanon, South Sudan, Sudan, Vietnam and Iraq.

⁴⁹ Landmine and Cluster Munition Monitor, Cluster Munition Monitor 2014, 2014, pp. 41-45.

⁵⁰ UNIDIR, The Humanitarian Impact of Cluster Munitions, 2008, p. 12.

⁵¹ Fares &Fares, 2013, pp. 2098-2099.

prominent among adolescents were nightmares, flashbacks, hysterical aphonia, neurological and craniofacial tribulations, emotional numbing and memory loss especially shortly after the traumatising event. Post-concussion syndrome (PCS) was identified in 30% of the test persons, causing headache, dizziness, concentration difficulties, sickness, light and noise intolerance and blurred vision.⁵² PTSD may also be caused by witnessing armed conflicts. Studies illustrate that 40% of 7 to 12 year old children are affected by PTSD during conflicts, whereas only 10% are concerned one year after. The experience of extreme violence may also lead to aggressive behaviour patterns and the consideration of violence as a solution.⁵³ Cluster Munition victims regularly pass through denial, refusal, anger and irritability phases as well as phobia and panic attacks which have serious implications for their social life. Also common are phantom limb pain (PLP), permanent disabilities and inabilities intensified by stress.⁵⁴ The study conducted in South Lebanon furthermore displayed that 37% of the child victims with amputation developed PLP, a chronic and neuropathic pain following an impairment of the nervous system itself often generated by the pain memory,⁵⁵ and 71% sustained stump/residual limb pain (SP/RLP), triggered by the disruption of the peripheral nerves.⁵⁶

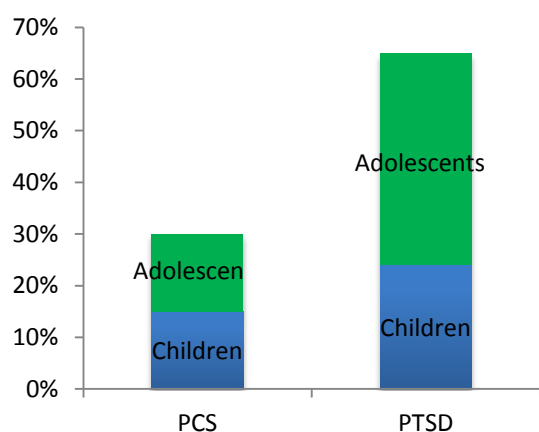


Diagram 4: Child Casualties with PCS/PTSD in South Lebanon

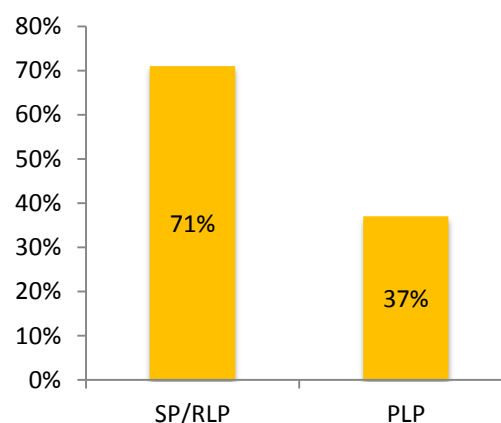


Diagram 5: Child Casualties with amputations in South Lebanon

⁵² Fares et al., 2013, pp. 1974-1975.

⁵³ Rieder & Choonara, 2012, p. 61.

⁵⁴ Fares & Fares, 2013, pp. 2098-2099.

⁵⁵ Idem., p. 2099.

⁵⁶ Fares et al., 2013, pp. 1971-1974.

Mental illnesses, drug abuse, social problems, long term psychological distress and higher drop-out rates are some of the psychological impacts on the development of children living in armed conflict settings.⁵⁷ Moreover, the traumatising of parents may result in the disregard of children who would need psychological support.⁵⁸ The inability of parents to deal with disabilities of children and the rejection of the family and the community quite often result in depression and a feeling of fault.⁵⁹ Besides those concrete psychological disorders, victims of Cluster Munitions with physical disabilities are also confronted with discrimination, according to their age and gender. Discrimination ranges from verbal abuse, exclusion from socio-economic activities, lacking access to education, healthcare and employment as well as sexual discrimination; most of it entailing socio-economic and further psychological implications for the victims and their families. In the worst case suicide and the inability to reintegrate oneself into the society are the consequence of feelings of abandonment, dependence, deformation and idleness.⁶⁰

2.4 Physical impacts and maiming

In contrast to anti-personal mines, which are aiming at injuring individuals, Cluster Munitions contain larger charges, made to kill, and hence putting children at a greater risk to die.⁶¹ As seen above, ERW cause the most child casualties in particular because of their high failure rate, their unpredictability and explosive force. Which of those casualties are due to Cluster Munitions is difficult to assess. Lack of resources and knowledge, ongoing conflicts, insecurity and under-reporting make it challenging to obtain reliable data. But available information about several countries, for instance in Vietnam, show that, in this case, Cluster Munitions and other UXOs are responsible for 55% of the casualties from 2003 to 2005 whereas comparatively lower percentage are

⁵⁷ Save the Children, *Devastating Impact. Explosive weapons and children*, 2011, p. 5.

⁵⁸ Save the Children, *Explosive weapons and grave violations against children*, 2013, p. 16.

⁵⁹ Fares et al., 2013, p. 1975.

⁶⁰ UNIDIR, *The Humanitarian Impact of Cluster Munitions*, 2008, pp. 12 - 13.

⁶¹ Williamson, 2011, p. 30.

due to landmines.⁶² The physical impacts of them are manifold. Victims may suffer from amputation of one or several limbs, fragmentation injuries, the loss of senses such as vision, hearing and touch, burns, internal injuries such as spinal cord damages⁶³ and serious traumas in various body parts for instance the chest, the abdomen, craniofacial regions as well as upper and lower limbs – a consequence of which is body deformation, chronic pain, impairment of body functions, PTSD and haemorrhagic shocks due to grave injuries of the vital structures caused by the explosion of submunitions. Furthermore, infections are frequently the result of the penetration of mud, grass, pieces of clothing and metal fragments into the wounds after detonation.⁶⁴ Those consequences are even worse for children, because of their small and undeveloped bodies. Child victims sustain more multifaceted harms of their organs and tissue than adults which are often hard to deal with. Their vulnerable chests and undeveloped ribs are frequently unable to shield their abdomen which leads to serious injuries of their organs, disabilities or death. Disabilities of children require more intensive care, surgeries and prostheses management, sometimes even up to 35 adjustments of the latter,⁶⁵ because their bodies are still growing. They also lead to further consequences such as unemployment, higher school drop-out rates, exclusion, exploitation, abuse, poverty, sexual discrimination, disregard and abandonment.⁶⁶ Upper limb injuries and blindness are more frequent in children since they often pick up the duds, considering them as cans, balls or toys.⁶⁷ Injuries in the head region may also result in traumatic brain injuries (TBI). Penetrating traumatic brain injury (pTBI) is caused by the intrusion of objects and small pieces into the brain which may lead to PTSD, PCS, neurological shortfalls or reduced consciousness, whereas neurological damages, disruption of the brain and PCS may follow a closed traumatic brain injury (cTBI), succeeding the motion and deformation of the brain after an explosion.⁶⁸

⁶² UNIDIR, *The Humanitarian Impact of Cluster Munitions*, 2008, pp. 9-11.

⁶³ Save the Children, *Devastating Impact. Explosive weapons and children*, 2011, p. 5.

⁶⁴ Fares & Fares, 2013, pp. 2097-2098.

⁶⁵ Williamson, 2011, p. 30.

⁶⁶ Save the Children, *Devastating Impact. Explosive weapons and children*, 2011, p. 5.

⁶⁷ Williamson, 2011, p. 30.

⁶⁸ Fares et al., 2013, p. 1975.

2.5 Access to healthcare and education

A conflict hinders the access to healthcare and education through the destabilisation and insecurity of the country or the region. The targeting of schools, health centres and hospitals as well as teachers and medical personnel with explosive weapons is unfortunately all too often used as a strategy of war.⁶⁹ The destruction of facilities and the use of them for military purposes, which possibly establishes a crime against humanity or war crime,⁷⁰ indirectly lead to death. The fear of teachers and children to go to school as well as parents to let their children go has far-reaching economic and social implications for the children and the society.⁷¹ Higher school drop-out rates, the closure and targeting of schools and hospitals as well as the loss of trust in those institutions contribute to the deprivation of the right to education and health, a safe learning and rehabilitation environment and the development of important abilities and knowledge for the future, pushing children in the hands of armed groups, poverty and vulnerability.⁷²

Cluster Munitions are often used in rural and remote areas. Hence, the access to healthcare for victims, 25% of them living one to six hours away from the next health facility, is additionally hampered, a problem which is also aggravated by the absence, destruction and contamination of roads. Given the fact that children are usually severely injured when becoming victims of Cluster Munition remnants, their chances of survival are small.⁷³ In case of survival the affected individuals are in need of intensive healthcare and long-term rehabilitation which is frequently not available or feasible, making victims and especially children dependent on the help and assistance from outside.⁷⁴

⁶⁹ Rieder & Choonara, 2012, p. 61.

⁷⁰ *Idem.*, p.12.

⁷¹ Save the Children, *Devastating Impact. Explosive weapons and children*, 2011, p. 6.

⁷² Save the Children, *Explosive weapons and grave violations against children*, 2013, pp. 12-13.

⁷³ Williamson, 2011, p. 30.

⁷⁴ UNIDIR, *The Humanitarian Impact of Cluster Munitions*, 2008, p. 11.

2.6 Diseases and displacement

Fleeing the country is often the only way to escape an armed conflict and the impacts of war. This implication of hostilities already created more than twelve million homeless and refugee children; the consequence of which may also be death caused by diseases. Triggered by the lack of access to food, clean drinking water, shelter and poverty, most of the refugees dying are children under the age of five, mainly because of malnutrition, infections, malaria, measles, respiratory diseases and diarrhoea.⁷⁵ The use of Cluster Munitions also hinders the return of refugees and internally displaced persons (IDPs) by destruction of roads, transportation, infrastructure and the contamination of land. Out of despair, many agriculturists return to their homes and start cultivating their land before it is cleared. On the other hand, if remaining in refugee camps, IDPs and refugees may become direct targets of Cluster Munition attacks, as it has already happened several times in the past.⁷⁶

2.7 Social and economic implications

People suffering the most from Cluster Munitions are those who are already in need, vulnerable or disregarded, such as the poor, men living in remote areas and working in agriculture, women, children, refugees and IDPs.⁷⁷ Child victims of Cluster Munitions already struck by the above mentioned psychological and physical impacts as well as lack of access to education, healthcare and proper rehabilitation, may also suffer from isolation, stigmatisation and exclusion, making integration almost impossible. Many children are similarly affected by disabilities of their parents and family members which may lead to poverty, higher school drop-out rates and the feeling of uselessness. More men tend to be victims of Cluster Munitions, basically because the traditional distribution of chores between men and women foresee that men are responsible for economic, outdoor and agricultural activities whereas women take care of the

⁷⁵ Rieder & Choonara, 2012, p. 61.

⁷⁶ UNIDIR, The Humanitarian Impact of Cluster Munitions, 2008, pp. 21-22.

⁷⁷ Idem., 2008, pp. 19-22.

household. Therefore, also boys are more vulnerable to become victims of Cluster Munitions if they are forced to take over the work of their injured parents.⁷⁸

Moreover, it should be kept in mind that Cluster Munitions also have huge economic implications for the individuals and the country. The costs of the damage caused by explosive weapons can be enormous and thereby also have a detrimental impact on the country's economic development.⁷⁹ After a conflict, the contamination of the country with Cluster Munitions hampers the reconstruction and the rebuilding of the destroyed infrastructure and housing. The costly clearing process requires a lot of money and time and prevents people from returning to normality. The extensive economic loss for victims of Cluster Munitions, not able to return to work, to find a job and the need for expensive rehabilitation care, and their families, responsible to take care of the injured, has also consequences for the economic well-being of the country and the community as such. All too often agriculture is the sector mainly affected which has massive social and economic impacts resulting from lack of water and food, contamination of the land and the loss of cattle, noticeable at all levels of society. In some countries, Cluster Munitions itself become a source of financial income. Usually the poor and those not aware of the danger collect UXOs in order to sell the precious metal as well as the explosive substances contained in it or clear the land of others in exchange for compensation.⁸⁰

2.8 Access to humanitarian assistance

The use of explosive weapons such as Cluster Munitions hampers the access of humanitarian workers to the conflict areas either because the infrastructure is destroyed or because of the contamination in the region. Therefore, children's and their family's access to humanitarian assistance is often denied. During a conflict, access to a country or region is often too dangerous for the humanitarian workers or refused by those in power. Once again, those desperately in need of the delivery of humanitarian assistance,

⁷⁸ Williamson, 2011, p. 30.

⁷⁹ Save the Children, Devastating Impact. Explosive weapons and children, 2011, p. 7.

⁸⁰ UNIDIR, The Humanitarian Impact of Cluster Munitions, 2008, pp. 16-19.

such as children, suffer the most. Moreover, the death and targeting of humanitarian workers in the recent past impedes the access and delivery of humanitarian aid.⁸¹ The presence of duds regularly endangers the work of the aid personnel, not allowing them to enter the concerned regions. Hence, affected families seeking assistance frequently take the risk and cross contaminated land or areas of conflict in order to receive it. In addition, necessary funds for the provision of aid after a conflict first need to be used for the clearance of land which often requires a lot of time and results in the delay of transfer of assistance. The obviolation of production and the damage for the economy and development following the immense costs emerging from the use of Cluster Munitions and the contamination of the land make countries, communities, families and individuals dependent on help and support from outside for a long time.⁸²

2.9 Environmental Effects

Finally, the environmental effects of Cluster Munitions should not be underestimated. Land degradation is one of the major concerns regarding the use of explosive weapons mainly because they have the capability to pollute the land in addition to the contamination with UXOs. The disturbance of the ecosystem at various ecological levels is primarily a result of the harm Cluster Munitions can do to the flora and fauna, diminution of biodiversity, disruption and deterioration of the soil, the pollution of the land with chemical substances, the excessive use of agricultural land which is not contaminated⁸³ and reduced production. Besides the danger Cluster Munitions pose for humans, they also damage the vegetation as well as they kill wild animals and livestock. The before discussed displacement of people also contributes to land degradation by influencing the ecosystem through the disruption of natural soil and water processes. The deterioration of the construction and the constancy of the soil caused by detonations lead to the transformation of the land, its moisture content, diminished productivity and erosion and thereby further aggravate peoples' access to water and agriculture.

⁸¹ Save the Children, *Explosive weapons and grave violations against children*, 2013, p. 15.

⁸² UNIDIR, *The Humanitarian Impact of Cluster Munitions*, 2008, pp. 13-15.

⁸³ *Idem.*, 2008, p. 14.

Increased heavy metal pollution and concentration have been found in areas contaminated by Cluster Munitions resulting in the pollution of huge amounts of land and water.⁸⁴ What is more, the hydrocarbon contamination and the pollution of the sewage have been observed after the use of explosive weapons, causing the elevated birth of babies with congenital abnormalities in Fallujah, Iraq in 2004, for instance.⁸⁵

⁸⁴ Fares &Fares, 2013, p. 2097.

⁸⁵ Save the Children, Devastating Impact. Explosive weapons and children, 2011, p. 7.

3. The international legal and institutional framework

After discussing the consequences and impacts of the use of Cluster Munitions, this part analyses the relevant international and institutional framework at three levels: IHL, HRL and the normative and policy framework of the UN. In the first place, it offers a short introduction on the use of weapons under international law as well as its main principles. Furthermore, it deals with the CCM in general and the main obligations of the SP. In a next step, it covers the GCs, the APs and their system of general and special protection of children. Concerning international HRL it focuses on the CRC, the OPs of this Convention as well as relevant child rights specific provisions of the CRPD. An emphasis is also placed on the connections between HRL and IHL. Finally, the normative and policy framework of the UN in the context of children affected by armed conflicts is analysed.

3.1 International Humanitarian Law

Cluster Munitions are in use now since more than 70 years and have probably caused around 55.000 casualties in over 30 countries. Because of the lack of information, it is difficult to say with certainty how many people are affected or became victims of Cluster Munitions, where exactly and from whom they have been used, how many have been deployed and how many of them became duds, still laying on the ground and waiting to be cleared.⁸⁶ Mainly because of the severe and long-term consequences following the use of these weapons, some scholars are of the opinion that their use constitutes a violation of IHL, but this argumentation has not been confirmed yet by international courts or tribunals. There have been cases where tribunals condemned the *specific* use as a violation of IHL, but that is not the case for the use of Cluster Munitions *per se*. Therefore, some states and non-governmental organisations (NGOs) initiated a process to draft a Convention aimed at prohibiting the use of these weapons

⁸⁶ Gro & Casey-Maslen, 2010, pp. 3-4.

and to alleviate human suffering, especially because the CCW failed to do so, which resulted in the adoption of the CCM on Friday 30 May 2008.⁸⁷ But before dealing with this Convention, the use of weapons under international law as well as the fundamental principles of IHL need to be analysed.

3.1.1 The use of weapons under international law

International law and IHL in particular state that the use of certain weapons in international armed conflicts (IAC) and non-international armed conflicts (NIAC) is in any case unlawful. If other weapons are not inherently discriminate with uncontrolled effects, they may be used legitimately if they respect the fundamental principles of IHL, which are the rule of military necessity, distinction, proportionality and precautions in attack.⁸⁸

3.1.1.1 Inherently indiscriminate weapons with uncontrolled effects

The use of a certain weapons respecting the fundamental principles of IHL can still be unlawful if it is an inherently indiscriminate weapon. This rule emanates from the principle of distinction and is considered to be a norm of *jus cogens*. Therefore, their use is prohibited at all times no matter if the parties to IAC or NIAC ratified the relevant treaties. To classify a weapon as inherently indiscriminate a) it has to be inherently incapable of being directed against military objectives only and b) the implications of the weapon inevitably cannot be restricted to those objectives. Although certain weapons are not inherently indiscriminate by nature (intended design),⁸⁹ they can be used in an indiscriminate way, which depends on the intention or the reckless behaviour of the attacker,⁹⁰ or they are more likely to have indiscriminate effects. Among those are anti-personal mines and Cluster Munitions, which thus try to be

⁸⁷ Raccuia, 2011, pp. 473-474.

⁸⁸ Casey-Maslen & Weill, 2014, pp. 246-272.

⁸⁹ Breitegger (a), 2012, p. 42.

⁹⁰ Idem., p. 42.

banned by international treaties. Article 51 (4) API covers the prohibition of indiscriminate attacks and gives some examples. When talking about weapons with uncontrolled effects, the Protocol defines them as weapons used in attacks which employ a method or means of combat the effects of which cannot be limited as required by the Protocol⁹¹ and subsequently violate the rule of distinction. Thereby weapons are covered which are, by nature, prone to cause huge amounts of civilian casualties and injuries as well as destructions of civilian objects such as biological weapons, bombardments in densely populated areas (area bombings)⁹² and weapons used in an indiscriminative way. According to some scholars, Cluster Munitions for example are already forbidden on the merits and to the extent of the rules of IHL, whereas others argue that there are realistic settings in which they might be used in a discriminative way in line with the fundamental principles which are discussed now.⁹³

3.1.1.2 Fundamental Principles of international humanitarian law

a) Military Necessity

IHL seeks to limit the use and methods of application of certain weapons which cause excessive human harm, killings and damages in armed conflicts. Therefore, the principle of military necessity endeavours to oppose the military necessity to the concept of humanity. If an attack triggers aggravated suffering, injury or destruction, it should be forbidden as long as it is not necessary considering military reasons. Hence, an attack has to be essential whereas military utility might not be sufficient to legitimate human suffering. The CCM amongst other disarmament treaties can be considered as a result of the intention to balance military necessity and the need to limit the use of those weapons for the protection of humanity.⁹⁴

⁹¹ Art. 51 (4) c) API, op. cit.

⁹² Art. 51 (5) a) API, op. cit.

⁹³ Casey-Maslen & Weill, 2014, pp. 246-255.

⁹⁴ Breitegger (a), 2012, pp. 40-41.

b) Distinction

Declared as customary international law, the principle of distinction, codified in Article 48 API to the GCs, related to the victims of IAC, determines that parties to the conflict shall at all times distinguish between the civilian population and civilian objectives on the one hand, and combatants and military objectives, which are making an effective contribution to military actions and offer a definite military advantage,⁹⁵ on the other hand and shall direct their operations against the latter only. It aims at protecting the civilian population not taking part in hostilities against the implications of those and has to be respected in IAC as well as in NIAC. The violation of this principle might establish a war crime, leading to individual criminal responsibility. As an example, a judgment of the ICTY concerning the use of Cluster Munitions in Zagreb in 1995, the so-called Martić case, in which Cluster Munitions were used in an inherently indiscriminate way, asserted that in this specific instance Cluster Munitions were incapable of hitting a specific target,⁹⁶ and thus their unlawful deployment constituted a violation of the principle of distinction.⁹⁷

c) Proportionality

Similar to Article 48 API, also Article 51 (5) (b) API is recognised as customary international law, which has to be respected in both IAC and NIAC. It covers the rule of proportionality directed at the avoidance of incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. Therefore, even if the rule of distinction is fulfilled, an attack may still be unlawful by causing excessive incidental civilian harm. A violation of this rule might also lead to individual criminal responsibility for committing a war crime.⁹⁸ The principle of proportionality complements the prohibition of indiscriminate attacks if it is difficult to

⁹⁵ Art. 52 (2) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) UNTS vol. 1125, I-17512.

⁹⁶ Prosecutor v. Milan Martić (Judgement) ICTY-IT-95-11 (12 June 2007), 463.

⁹⁷ Casey-Maslen & Weill, 2014, pp. 262-263.

⁹⁸ Idem., pp. 263-264.

demonstrate the recklessness of the attacking party. Hence, an assessment of the proportionality has to be made prior to the attack which demands an objective balancing between the expected possible loss of civilian lives and the concrete and direct military advantage.⁹⁹ When it comes to the problem of what is *excessive*, no clear answer can be given. According to a committee set up by the prosecutor of the ICTY, this question has to be decided on a case by case basis whereas the International Committee of the Red Cross (ICRC) declared that in case of doubt about the excessiveness of an attack, the interest of the civilian population should always prevail. With regards to certain weapons such as Cluster Munitions, international law tries to outlaw them by treaty or to restrict their use if they are considered to cause excessive harm to the civilian population in general.¹⁰⁰ Concerning the use of Cluster Munitions it might very likely come to a violation of the principle of proportionality if they are applied in or close to a densely populated area because of the inaccuracy and the wide-area effects of those weapons. The issue of long-term implications for civilians and especially for children caused by the high failure rate of Cluster Munitions should also be taken into consideration in the proportionality assessment, but this is debated internationally.¹⁰¹

d) Precautions in Attack

Finally, the principle of precautions in attack, which is considered to be customary law, applicable in IAC and NIAC, strives to guarantee that constant care shall be taken by the parties to the conflict in order to spare the civilian population, civilians and civilian objects,¹⁰² which is regarded to be an obligation of due diligence and an emanation of the principle of distinction. Even if the principles of distinction, necessity and proportionality are fulfilled, the attacker has to do everything feasible to take precautions so as to verify that the targeted objectives are neither civilians nor civilian objects. Concerning the choice of means and methods, incidental loss of civilian life, injury to civilians and damage to civilian objects has to be avoided and in any way

⁹⁹ Breitegger (a), 2012, p. 48.

¹⁰⁰ Casey-Maslen & Weill, 2014, pp. 264 -268.

¹⁰¹ Breitegger (a), 2012, pp. 48-49.

¹⁰² Art. 57 (1) API, op. cit.

minimised. Furthermore, parties to the conflict shall refrain from any attacks that would violate the principle of proportionality.¹⁰³ When it comes to the definition of *feasible*, it can be drawn upon Article 3 (10) CCW which states that feasible precautions are those precautions which are practicable or practicably possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations. Moreover, according to Article 57 API parties to the conflict shall give effective advance warning to the civilian population if possible and shall select objects which cause minimum danger to civilian lives. Thus, the rule requires the assessment of the selection of the weapon used which is especially relevant for the use of Cluster Munitions.¹⁰⁴

3.1.2 The Convention on Cluster Munitions

Main treaties of IHL are the GCs and their APs. When they were negotiated in 1977 to address shortfalls of the GCs, weapon-specific regulations have been considered but finally not adopted. Only in 1980 the international community could agree on the adoption of a Convention which regulated the use of certain conventional weapons, the CCW. However, the CCW did not include provisions governing the use of Cluster Munitions. 13 years later, the success of the APMBC, adopted in 1997, and the greater awareness of the impacts of AXOs and UXOs on the civilian population, led to the adoption of a fifth AP to the CCW, dealing with ERW. Nevertheless, Protocol V of 2003 also failed to treat Cluster Munitions and their characteristics in particular.¹⁰⁵ According to Article 2 of the Protocol, ERW are very generally defined as UXOs and AXOs and thereby also encompass submunitions but the Protocol does not address at all the effects of Cluster Munitions at the time of their use, namely the wide dispersal pattern and the inaccuracy of those weapons, as well as the consequences following the use of Cluster Munitions.¹⁰⁶ This matter of fact as well as the conflict between

¹⁰³ Art 57 (2) a) (i)-(iii) API, op. cit.

¹⁰⁴ ICRC, International Humanitarian Law and the challenges of contemporary armed conflicts, 2011, p.42.

¹⁰⁵ Gro & Casey-Maslen, 2010, pp. 11-13.

¹⁰⁶ Breitegger (a), 2012, pp. 58-59.

Hezbollah and Israel in southern Lebanon in 2006 in particular, where Cluster Munitions have been used and failed to explode in very high rates and thereby had a huge impact on civilians until today, gave rise to the emergence of a process to negotiate a Convention, like the APMBC, specifically dealing with the ban of Cluster Munitions as an entire category. This so-called Oslo Process was led by Norway as well as a core group of 6 other states¹⁰⁷ and finally resulted in the adoption of the CCM in 2008, categorically prohibiting Cluster Munitions and trying to address the humanitarian impacts caused by these weapons.¹⁰⁸

3.1.2.1 General Information

In 2008, 107 states adopted the 23 Articles comprising CCM in Dublin, which was opened for signature in December of the same year. In accordance with Article 17 (1) CCM, the Convention entered into force six months after the ratification of 30 states, on 1 August 2010. By now, 8 July 2015, the Convention was ratified by 92 states (26 from Africa, 22 of the Americas, 3 from Asia, 32 from Europe, 3 from the Middle East and 6 of the Pacific) and signed by further 24 states (16 from Africa, 3 of the Americas, 2 from Asia, 2 from Europe and 1 of the Pacific).¹⁰⁹ The comprehensive Convention on the one hand bans the use, the development, the production, the acquisition, the stockpiling, the retention and the transfer of Cluster Munitions (disarmament approach) and, on the other hand, provides for the clearance of contaminated areas and requires risk education, victim assistance as well as international cooperation (humanitarian approach). During its negotiation process, the question of the interoperability and the definition of Cluster Munitions were highly debated. Instead of prohibiting all weapons which contain submunitions, the states finally agreed on a definition which has some exceptions concerning weapons with a specific number and weight of submunitions, the ability to target a single object and the equipment with a self-destruction and a self-

¹⁰⁷ Austria, Ireland, Mexico, New Zealand, Peru and the Holy See.

¹⁰⁸ Gro & Casey-Maslen, 2010, pp. 14-36.

¹⁰⁹ Convention on Cluster Munitions, Convention Status, at <http://www.clusterconvention.org/the-convention/convention-status/> (consulted on 8 July 2015).

deactivating mechanism.¹¹⁰ So far only a few weapons with submunitions fulfilled these requirements. Regarding the interoperability, states inserted the controversial Article 21 CCM on ‘Relations with States not Party to the Convention’, allowing the engagement in military cooperation and operations with states not party to this Convention that might engage in activities prohibited to a SP,¹¹¹ although it also clarifies that assistance, encouragement or inducement to engage in any activity prohibited is under any circumstance forbidden.^{112, 113} The main obligations and key provisions are discussed in the following.

3.1.2.2 Obligations of the State Parties

a) General Obligations

Article 1 of the CCM, probably the most important Article of the Convention, determines that SP *never under any circumstance*, thereby referring to any situation either in times of peace or wartimes as well as armed conflicts, use, develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, Cluster Munitions as defined in Article 2 CCM or assist, encourage or induce anyone to engage in any activity prohibited to a SP under this Convention.¹¹⁴ Although mines are explicitly excluded from the scope of the CCM, the broad prohibitions of Article 1 (1) CCM also apply to explosive bomblets set off by aircrafts.^{115, 116} Main addressee of these prohibitions and obligations are states. Nevertheless, Article 1 CCM as well as preambular paragraph twelve, also deal with non-state armed groups (NSAG). They shall be detained to engage in any activity prohibited by the Convention¹¹⁷ or to receive Cluster Munitions by any SP.¹¹⁸ According to Article 19 CCM, SP are not allowed to

¹¹⁰ Art. 2 (2)(c) CCM, op. cit.

¹¹¹ Art. 21 (3) CCM, op. cit.

¹¹² Art. 1 (1)(c) CCM, op. cit.

¹¹³ Human Rights Watch et al., Banning Cluster Munitions, 2009, p. 8.

¹¹⁴ Art. 1 (1) (a)-(c) CCM, op. cit.

¹¹⁵ Art. 1 (2) CCM, op. cit.

¹¹⁶ Gro & Casey-Maslen, 2010, pp. 96-98.

¹¹⁷ Preambular paragraph 12 of the CCM, op. cit.

¹¹⁸ Art. 1 (1)(b) CCM, op. cit.

make any reservations to the obligations¹¹⁹ which apply immediately after ratification and which have a comprehensive and universal dimension, indicated by the commitment to fulfil them in any circumstance.¹²⁰

b) Clearance and risk reduction education

Article 4 CCM prescribes the obligation of the SP to clear and destroy Cluster Munition remnants, as defined in Article 2 (7) CCM, under its jurisdiction or control within ten years after entry into force of the Convention for the SP or after the end of active hostilities and thereby meaning to make the contaminated area safe from hazards as well as to make them inoperable.¹²¹ Subsequent to completion, SP are required to declare compliance with its obligation.¹²² In case of inability to perform its duties within ten years, SP can request extensions to do so. In regards to the protection of civilians, several important measures have to be taken when fulfilling these responsibilities. First of all to survey, assess and record the threat, to evaluate and prioritise needs as well as to mark, fence and monitor hazardous areas and to conduct risk education and awareness-raising, which is especially important when it comes to children, to mobilise resources and finally to develop a national plan.¹²³

International standards as well as the international mine action standards (IMAS) have to be taken into account, while undertaking these measures.¹²⁴ Instead of obliging past users to assist affected states to fulfil their tasks according to Article 4 CCM, which was initially part of the draft of the Convention, states could finally only agree on a moral responsibility to strongly encourage past users to provide assistance for the marking, clearance and destruction activities and *if available* to deliver relevant information on types and quantities of the Cluster Munitions used, precise locations of Cluster Munition strikes and areas in which Cluster Munition remnants are known to be

¹¹⁹ GICHD, A Guide to Cluster Munitions, 2009, pp. 34-35.

¹²⁰ Gro & Casey-Maslen, 2010, p. 110.

¹²¹ *Idem.*, 2010, p. 289.

¹²² Art. 4 (1)(c) CCM, *op. cit.*

¹²³ Art. 4 (2)(a)-(e) CCM, *op. cit.*

¹²⁴ GICHD, A Guide to Cluster Munitions, 2009, pp. 38-39.

located.¹²⁵ An innovative concept of international disarmament law had to give way to the argument that states might be deterred to accede to the Convention and thus the protection of civilians was watered down.¹²⁶

c) Victim Assistance

One of the extremely important provisions of the CCM for the topic of this paper is Article 5. This Article is one of the most advanced and extensive regulation of victim assistance in disarmament and humanitarian law.¹²⁷ It requires that each SP provides age and gender sensitive assistance, including medical care, rehabilitation and psychological support, as well as that it provides for the social and economic inclusion of Cluster Munition victims in areas under its jurisdiction or control.¹²⁸

Furthermore, SP have to collect reliable data in this regard, which is one of the major problems when it comes to information and knowledge about casualties and Cluster Munitions affected communities as dealt with before. In order to implement their obligations, states shall assess the needs of Cluster Munition victims, develop, implement and enforce national laws and policies as well as develop a national plan and budget, mobilise resources, not discriminate against or among Cluster Munition victims or others who have suffered injuries or disabilities from other causes, consult and involve Cluster Munition victims, set up a focal point and finally incorporate relevant guidelines and good practices.¹²⁹

Those measures are based on HRL and in particular the CRPD, also referred to in preambular paragraph nine, and go far beyond IHL. The obligation to act in accordance with IHL and HRL, emphasised in this Article, can be seen as indication for the close relation between those spheres of law. In terms of the very broad definition of Cluster Munition victims, the Convention is also extremely far-reaching and probably the result of the severe impacts of Cluster Munitions on the enjoyment of human rights. It

¹²⁵ Art. 4 (4) CCM, *op. cit.*

¹²⁶ Breitegger (a), 2012, pp. 196-198.

¹²⁷ GICHD, *A Guide to Cluster Munitions*, 2009, p. 39.

¹²⁸ Art. 5 (1) CCM, *op. cit.*

¹²⁹ Art. 5 (2) CCM, *op. cit.*

encompasses all persons, directly affected as well as their families and communities, who have been killed or suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights caused by the use of Cluster Munitions.¹³⁰ Unfortunately, similar to Article 4 CCM, states could not agree on an obligatory responsibility of past user states to assist contaminated states in terms of victim assistance.¹³¹

d) Stockpile Destruction

The disarmament dimension of the Convention is primarily reflected in Article 3 CCM. It defines that SP shall destroy retained Cluster Munition stockpiles under their jurisdiction or control, meaning every stockpile in the sovereign territory of a state which even applies extra-territorially,¹³² as soon as possible but not later than eight years after entry into force of the Convention for the SP.¹³³ In exceptional circumstances, SP may request extension of this deadline up to four years if the requirements of Article 3 (4) CCM are fulfilled. The extension request may also be repeated.^{134, 135}

The very expensive, complex and time-consuming destruction process has to obey applicable international standards aiming at the protection of public health and the environment.¹³⁶ Although this Article is directed at the destruction of Cluster Munition stockpiles, it allows for the retention or acquisition of a limited number of Cluster Munitions and explosive submunitions absolutely necessary for the development of and the training in Cluster Munitions and explosive submunition detection, clearance or

¹³⁰ Art. 2 (1) CCM, *op. cit.*

¹³¹ Breitegger (a), 2012, pp. 198-203.

¹³² GICHD, *A Guide to Cluster Munitions*, 2009, p. 37.

¹³³ Art. 3 (2) CCM, *op. cit.*

¹³⁴ Art. 3 (3) CCM, *op. cit.*

¹³⁵ Gro & Casey-Maslen, 2010, pp. 248-250.

¹³⁶ Art. 3 (2) CCM, *op. cit.*

destruction techniques, or for the development of Cluster Munition counter-measures.^{137, 138}

e) International Cooperation and Assistance

In order to implement the obligations *inter alia* referred to in the above covered Articles 3, 4 and 5 CCM, SP may seek and receive assistance of SP, the UN, international, regional or national institutions and NGOs amongst others.¹³⁹ All SP *in position to do so*, thus again limiting the scope of the provision, shall provide technical, material and financial assistance. This Article serves the twofold objective of the Convention - disarmament and the alleviation of human suffering by thereby sharing the burden to overcome the problem of Cluster Munitions and by convincing states to accede to the Convention. The CCM, again, goes a step further than other disarmament treaties as it requires not only assistance for clearance, stockpile destruction and victim assistance, but also economic and social recovery¹⁴⁰ as well as cases of emergency.^{141, 142} Furthermore, SP have the right to participate in the exchange of equipment and scientific and technological information and shall remove all obstacles impeding the delivery of assistance for humanitarian purposes and the implementation of the Convention.^{143, 144} Article 6 CCM shows the connection of disarmament law and HRL. By providing assistance and resources to SP which are not able to implement their obligations or which are lacking funds as well as by giving SP the right to seek for international cooperation and assistance, the CCM transforms the concept of collective responsibility, which goes beyond the affected and the user state,¹⁴⁵ to achieve progressive realisation of economic, social and cultural rights, into disarmament law. Inspired by the International Covenant on Economic, Social and Cultural Rights

¹³⁷ Art. 3 (6) CCM, *op. cit.*

¹³⁸ GICHD, *A Guide to Cluster Munitions*, 2009, pp. 37-38.

¹³⁹ Art. 6 (1)-(2) CCM, *op. cit.*

¹⁴⁰ Art. 6 (8) CCM, *op. cit.*

¹⁴¹ Art. 6 (6) CCM, *op. cit.*

¹⁴² Gro & Casey-Maslen, 2010, pp. 376-378.

¹⁴³ Art. 6 (3) CCM, *op. cit.*

¹⁴⁴ GICHD, *A Guide to Cluster Munitions*, 2009, p. 40.

¹⁴⁵ Hayashi, 2012, p. 343.

(ICESCR), the duties of Art 6 CCM are based on the collective obligations constituted in this human rights treaty and that is especially relevant in terms of victim assistance.¹⁴⁶

In order to accomplish the aims of the CCM, the effective implementation of the above covered action-orientated and collective obligations is vital. The far-reaching scope and improvement of disarmament law, especially in terms of victim assistance, is mainly based on the impact of the CRPD and proves the increasingly close connection between HRL and IHL which can also be seen in the obligation to assist and cooperate, influenced by the ICESCR. Nevertheless, the ability of the CCM to fully reach its objectives, in particular to alleviate human suffering, is dependent on a human rights- and humanitarian-orientated implementation of the Convention by SP. Adopting and ratifying a Convention is one side of the coin, whereas the implementation of obligations that a SP expressed its consent to is another matter. Regrettably, some states have already sent negative signals on implementing the Convention properly, especially when it comes to Article 1 (1) (b)(c) CCM and Article 21 (2)-(4) CCM. On the other hand, SP could in the course of the first meeting of SP in Lao PDR in 2010 achieve the adoption of the VAP which tries to persuade states to implement their positive obligations in terms of stockpile destruction, clearance and victim assistance. This plan, in addition to measures as well as formal and informal tools to be taken by the SP in order to implement the Convention, is discussed in detail in chapter four of the present thesis (see 4.1.). Now, the GCs as well as the APs and their system of general and special protection of children are examined.^{147, 148}

¹⁴⁶ Breitegger (a), 2012, p. 202.

¹⁴⁷ Idem., 2012, pp. 218-221.

¹⁴⁸ Blazeby, 2009, pp. 721-722.

3.1.3 The Geneva Conventions and the Additional Protocols

Besides the very important regulation of the use of weapons, the Geneva system aims at the protection of those who are not or no-longer taking part in hostilities such as children. As civilians they are granted general protection in case of armed conflicts. Furthermore, the GCs and the APs establish a system of special protection of children which is also applicable if they take part in hostilities, keeping in mind their specific vulnerability in times of IAC and NIAC.¹⁴⁹ The CRC and its OPs also address the issue of children participating in hostilities which will be dealt with later on. In the following, the systems of general and special protection of children under the GCs and the APs are analysed.

3.1.3.1 General Protection

The fourth of the GCs, concerned with the protection of civilians in times of war as well as API dealing with IAC, provides general protection for children not taking part in hostilities. According to these treaties and the basic principle of *humane treatment*, children benefit from the provisions guaranteeing the right to life, the prohibitions on coercion, corporal punishment, torture, collective punishment and reprisals¹⁵⁰ in particular and shall be treated humanely in all circumstances which requires, as a minimum, the enjoyment of fundamental guarantees stated in Article 75 API such as the protection of life, health, physical or mental well-being and the personal dignity. Furthermore, the provisions regarding the conduct of hostilities are applicable to children as part of the civilian population, in particular Article 48 API, specifying the principle of distinction and Article 51 API, covering the prohibition of indiscriminate attack and the principle of proportionality. Common Article 3 to the GCs and Article 4 and 13 of APII are relevant for the protection of children during NIAC by repeating the principle of humane treatment, by granting fundamental guarantees to those not taking

¹⁴⁹ ICRC, *Legal Protection of Children in Armed Conflict*, 2013, p. 1.

¹⁵⁰ Art. 27-34 Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) UNTS vol. 75, I-973.

part in hostilities and by prohibiting the targeting of the civilian population and individual civilians.¹⁵¹

3.1.3.2 Special Protection

Based on the specific vulnerability of children in times of conflict, several provisions of the GCIV are devoted to the special care of children for instance in terms of evacuation and special zones, assistance and care, identification, family reunification, orphaned and unaccompanied children, education and cultural environment, personal rights, preferential treatment, arrested, detained or interned children and the exemption from death penalty. However, only API defines the principle of special protection of children by stating that children shall be the object of special respect, shall be protected against any form of indecent assault and that the parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason¹⁵² which also applies for NIAC according to Article 4 (3) APII. The observance of those rules beforehand and the guarantee of special and general protection of children by the parties to the conflict would contribute to the decrease of child victims, alleviate the impacts of war and allow for the enjoyment of fundamental rights of children.

But international HRL also constitutes a legal basis for the protection of children in armed conflicts is demonstrated in the next part.

3.2 Human Rights Law

The issue of the protection of children's rights in armed conflicts is also dealt with by HRL. It has its legal basis in several human rights treaties and in particular the CRC and its OPs, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the ICESCR, the Convention Against Torture (CAT), the International Labour Organisation (ILO) Conventions 29 and 182 as

¹⁵¹ ICRC, *Legal Protection of Children in Armed Conflict*, 2013, p. 1.

¹⁵² Art.77 API, *op. cit.*

well as customary international HRL.¹⁵³ The present thesis exclusively deals with the CRC and its OPs and covers relevant provisions of the CRPD important for the purpose of this thesis.

3.2.1 The Convention on the rights of the child

Although every state in the world, besides the United States and Somalia, has ratified the CRC, there is nearly no other area where SP have failed to comply with their obligations in such an extensive way. Given the outstanding legitimacy of children's rights and the commitment of almost every state to protect them, the priority-setting, the assignments of funds and the implementation of the CRC show a completely different picture. Having this in mind, it is of utmost importance to look at children as a distinctive group of right-holders with specific needs, both in terms of protection as well as participation. The very broad and 54 Articles comprising Convention includes not only civil and political rights but also social, economic and cultural rights and by that takes into account a wide range of aspects relevant for the development of children and adolescents. Through the perception of autonomy of children on the one hand and a protection perspective on the other hand, the CRC pursues a comprehensive CRBA with regards to all dimensions of rights, which can be divided into protection rights, provision rights and participation rights.¹⁵⁴

According to Article 43 CRC, the Committee on the Rights of the Child is the main body to examine the progress made by SP in achieving the realization of the obligations undertaken by the Convention. In its General Comment No. 5 on general measures of implementation of the CRC the Committee identified four general principles of the Convention which shall be considered in particular when implementing it: a) to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind (principle of non-discrimination, Art. 2 CRC), b) to acknowledge the best interests of the child as a primary consideration in all actions

¹⁵³ SRSR-CAAC, *The Six Grave Violations Against Children During Armed Conflict: The legal foundation*, 2013, p. 10.

¹⁵⁴ Sax, 2012, pp. 422-432.

concerning children (best interest of the child principle, Art. 3(1) CRC), c) to ensure to the maximum extent possible the survival and development of the child according to the child's inherent right to life (Art. 6 CRC) and d) to give due weight to the child's right to express his or her views freely in all matters affecting the child (principle of participation, Art. 12 CRC).¹⁵⁵ No derogation of those principles is permitted, whether in times of war, armed conflicts or emergencies.¹⁵⁶

Children's right to life and the obligation of SP to ensure their survival and development according to Article 6 CRC is probably the most relevant provision when it comes to the use of Cluster Munitions. Related this provision are the obligations to diminish child mortality, to ensure necessary medical assistance and health care¹⁵⁷ and to recognize the right of every child to a standard of living adequately for the child's physical, mental, spiritual, moral and social development.^{158, 159} Pursuant to Article 4 of the Convention, requiring SP to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the CRC, the Committee furthermore extensively prescribes general measures of implementation to be taken by the SP in order to guarantee the full enjoyment of all rights of the Convention by all children inter alia the review of reservations, the ratification of other key international human rights instruments, and the adoption of legislative, administrative and other measures.¹⁶⁰ Besides the interpretative General Comments of the Committee, also the reporting procedure obligatory for the SP, with the participation of international bodies, NGOs and youth ombudspersons amongst others and the subsequent issuing of non-binding concluding observations by the Committee to the governments, as well as the holding of general discussions, contribute to a better assessment of the implementation process of the CRC.¹⁶¹

¹⁵⁵ Committee on the Rights of the Child, General Comment No. 5, 2003, pp. 1-21.

¹⁵⁶ Committee on the Rights of the Child, Report on the second session, 1992, para. 67.

¹⁵⁷ Art. 24 (2) (a) (b) CRC, op. cit.

¹⁵⁸ Art. 27 (1) CRC, op. cit.

¹⁵⁹ Breitegger (a), 2012, p. 102.

¹⁶⁰ Committee on the Rights of the Child, General Comment No. 5, 2003, pp. 1-21.

¹⁶¹ Sax, 2012, pp. 422-432.

According to international customary law, applicable in IAC and NIAC, children affected by armed conflicts are entitled to special respect and protection.¹⁶² The almost universally ratified CRC therefore states that, in accordance with their obligations under IHL to protect the civilian population in armed conflicts, SP shall take all feasible measures to ensure protection of and care for children who are affected by an armed conflict¹⁶³ and thereby also pay special attention to the needs of children commonly agreed to be especially vulnerable (see 1.5.2). Through Article 38 CRC, the Convention sets standards in terms of the protection of children in armed conflicts by referring to the application of rules of IHL relevant to children.¹⁶⁴

3.2.1.1 Optional Protocols to the Convention on the rights of the child

Three OPs to the CRC, namely the OP on the involvement of children in armed conflicts,¹⁶⁵ which entered into force in 2002, the OP on the sale of children, child prostitution and child pornography of the same year,¹⁶⁶ as well as the OP on a communication procedure of 2014, supplement the Convention. Especially the latter is of huge importance by allowing children to submit complaints for violations of their rights guaranteed by the CRC and the OPs.¹⁶⁷

3.2.2 The Convention on the Rights of Persons with Disabilities

According to the World Report on Disability of the World Health Organization (WHO), there are 93 million children from 0-14 years and around 150 million children and

¹⁶² ICRC, Customary International Humanitarian Law, 2005, Rule 135.

¹⁶³ Art. 38 (4) CRC, op. cit.

¹⁶⁴ Art. 38 (1) CRC, op. cit.

¹⁶⁵ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (adopted 25 May 2000, entered into force 12 February 2002) UNTS vol. 2173, A-27531.

¹⁶⁶ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25 May 2000, entered into force 18 January 2002) UNTS vol. 2171, A-27531.

¹⁶⁷ Preambular para. 6 Optional Protocol to the Convention on the Rights of the Child on a communications procedure (adopted 19 December 2011, entered into force 14 April 2014) UNTS, A-27531.

adolescents under the age of eighteen with moderate or severe disabilities.¹⁶⁸ Many of those disabilities are caused by armed conflicts and their aftermath as observed by the Committee on the Rights of the Child in its General Comment No. 9.¹⁶⁹ Proportionate to one child killed in conflict, at least three children get injured or permanently disabled. Disabilities of children resulting from armed conflicts are either caused *directly*, through injuries, mines, Cluster Munitions or other weapons as well as UXOs, toxic material or direct participation in hostilities, or *indirectly*, through the breakdown of the health system, illnesses or diseases and malnutrition.¹⁷⁰ Therefore the Committee on the Rights of the Child stresses the obligation of the SP to the CRC to take all necessary measures to protect children from the detrimental effects of war and armed violence and to ensure that children affected by armed conflicts have access to adequate health and social services, including psychosocial recovery and social reintegration. Because of the specific vulnerability and the severe consequences of weapons and conflicts for children, it underlines the importance of awareness-raising in terms of landmines and UXOs and urges SP to continue to locate mines and UXOs, to take measures to keep children away from suspected areas, and to strengthen their de-mining and clearance activities.¹⁷¹ In this context Article 39 CRC on victim assistance for children affected by armed conflicts and Article 23 CRC on disabled children, which offers additional guidance on how to fully implement all children's rights and especially of those with disabilities, has to be mentioned.¹⁷² According to the latter Article, states are in particular obliged to recognise the right of the disabled child to special care and their specific needs, to allow for the effective access to services so as to promote the child's social integration and individual development and to promote self-reliance as well as to facilitate the child's active participation in the community.¹⁷³

The comprehensive obligations of SP according to Article 5 CCM on victim assistance are also consistent with human rights standards, in particular with the CRPD, entered

¹⁶⁸ WHO, World Report on Disability, 2011, p. 36.

¹⁶⁹ Committee on the Rights of the Child, General Comment No. 9, 2006, para. 55.

¹⁷⁰ Canepa, 2014, pp. 175-186.

¹⁷¹ Committee on the Rights of the Child, General Comment No. 9, 2006, para. 55.

¹⁷² Breitegger (a), 2012, pp. 103 and 131.

¹⁷³ Art. 23 (1)-(3) CRC, op. cit.

into force in 2008,¹⁷⁴ and hence connect disarmament law with HRL expressly in this area. Although this Convention is, according to its definition, only applicable to persons directly affected by weapons such as Cluster Munitions, whereas the CCM also encompasses families and communities, it is important to note that “the character of the CRPD as an HRL convention reaffirms that the taking of positive measures by a state to assist victims of armed conflicts, including cluster munition victims, is nothing but an issue of promoting, protecting and ensuring the full and equal enjoyment of all human rights they already have by virtue of their inherent dignity.”¹⁷⁵

An essential provision of the CRPD relevant for this thesis is Article 3 CRPD on general principles such as non-discrimination, which has its counterpart in Article 2 CRC and is also expressed in Article 5 (e) CCM, individual autonomy and participation, likewise stressed by the CRC and Article 5 (f) CCM, and equality as well as accessibility, particularly relevant in terms of access to medical services for children with disabilities living in remote areas and the elimination of life-impeding barriers.¹⁷⁶ Article 8 CRPD on awareness-raising is of importance regarding the specific needs and rights of persons with disabilities including Cluster Munition victims. The obligation of SP to collect reliable data with respect to Cluster Munition victims is an expression of the existing obligation of Article 31 CRPD to collect appropriate information in order to formulate and implement policies and to assess the implementation process of the SP. Similarly Article 32 CRPD acknowledges the significance of international cooperation and assistance for the full realization of the rights of persons with disabilities which is also referred to in Article 6 (7) CCM in relation to assistance for the implementation of Article 5 CCM and Article 5 (d) CCM as to resource mobilisation. Article 25 (b) CRPD requires states to provide those health services needed by persons with disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities. As mentioned above, especially children are in need of adequate emergency medical care, trauma surgical management, long-term rehabilitation and prostheses management due to severe injuries caused by Cluster

¹⁷⁴ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UNTS, vol. 2515, I-44910.

¹⁷⁵ Breitegger (a), 2012, p. 108.

¹⁷⁶ Art. 9 CRPD, op. cit.

Munitions and their ongoing growth which has to be provided in remote areas as well¹⁷⁷ (see 2.5). Article 26 CRPD, dedicated to habilitation and rehabilitation, provides for the full inclusion and participation of persons with disabilities in all aspects of life (see. 2.5 and 2.7) covering also psychological rehabilitation (see 2.3) as well as the support with medical assistive devices and thereby also contributes to the personal mobility of children with disabilities demanded by Article 20 CRPD. Finally, in analogy to Article 5 CCM and Article 4 CRC, Article 4 CRPD obliges SP to adopt appropriate national measures in order to implement the rights recognised in the Convention. Therefore, this Convention has several monitoring and implementation mechanism at its disposal, including the establishment of a Committee on the Rights of Persons with Disabilities¹⁷⁸ as well as national focal points¹⁷⁹ also provided for by Article 5 (2) (g) CCM, a reporting procedure obligatory for the SP,¹⁸⁰ and a complaint procedure as well as an inquiry procedure according to the OP of the Convention. Especially the complaints procedure allows for complaints of child victims of Cluster Munitions with disabilities in case of the violation of their rights guaranteed by the CRPD.¹⁸¹

3.3 Concluding remarks on the relationship between IHL and HRL

Against the backdrop of the specific analysis of IHL and HRL relevant for child victims of cluster munitions, certain concluding remarks on the relationship between these two legal regimes shall be briefly presented here. Both frameworks share common characteristics but also differ in various ways. Their mutual aim is the protection of human beings, their lives, health as well as their dignity through the regulation of methods and means of warfare, the protection of those not or no longer taking part in hostilities as well as the provision of fundamental guarantees (IHL) or rights (HRL), especially for the most vulnerable such as children. Whereas IHL is specifically applicable in situations of armed conflicts, states often derogate their obligations under

¹⁷⁷ Art. 25 (c) CRPD, op. cit.

¹⁷⁸ Art. 34 CRPD, op. cit.

¹⁷⁹ Art. 33 (1) CRPD, op. cit.

¹⁸⁰ Art. 35 CRPD, op. cit.

¹⁸¹ Breitegger (a), 2012, pp. 108-115 and 200-202.

HRL in cases of emergencies, notably armed conflicts. Nevertheless, there are certain rights guaranteed by HRL which are not derogable, in particular the right to life, the prohibition of torture or cruel, inhuman or degrading treatment and slavery. IHL binds all parties of the conflict in all circumstances, including NSAG and therefore oversees their horizontal relationship. HRL on the contrary explicitly establishes duties for states, regulating the vertical relationship between states and individuals living on their territory or under their jurisdiction. Whether or not HRL is also applicable to NSAG is debated. Particularly in cases of effective control of a region or territory, the SC calls for respect of HRL also by NSAG. Similarly, the extraterritorial application of HRL for states is disputed while IHL applies wherever an armed conflict takes place.¹⁸² In terms of the relationship of the two frameworks, the Human Rights Committee expressed in its General Comment No. 31 the opinion that both spheres of law are complementary, not mutually exclusive (complementary approach),¹⁸³ whereas the International Court of Justice (ICJ) took the *lex specialis* approach. According to this approach, developed in the ICJs *Nuclear Weapons* and *Wall* Advisory Opinions, the more explicit and restrictive rule (*lex specialis*) overrides the implicit and broader one (*lex generalis*) if IHL and HRL are at conflict with each other. In such a case the general rule is not extinguished and shall be consulted for interpretation, unless harmonization is not possible.¹⁸⁴ Cases of exclusive application of either HRL or IHL are unproblematic which is for instance the case regarding the social and economic reintegration of victims after conflicts, claimed to fall under the regime of HRL which is, for example, expressed in the obligation of the SP to the CCM to provide assistance to Cluster Munition victims.¹⁸⁵ In terms of the legitimate use of Cluster Munitions, respecting the fundamental principles of IHL, as well as appropriate marking, clearance, risk education and warnings of people affected by UXOs, both spheres of law need to be consulted.¹⁸⁶ Finally, only in cases of violations of HRL, individuals have the possibility to initiate a complaints procedure against states, provided for by several human rights treaties.

¹⁸² Breitegger (b), 2012, pp. 512-520.

¹⁸³ Human Rights Committee, General Comment No. 31, 2004, para. 11.

¹⁸⁴ International Law Commission, Report on the work of its fifty-eighth session to the General Assembly, 2006, p. 409.

¹⁸⁵ Art. 5 (1) CCM, op.cit.

¹⁸⁶ Breitegger (a), 2012, pp. 90-92.

Redress for serious violations of IHL may only be claimed in front of the ICC according to the Rome Statute but this specifically deals with individual criminal responsibility, not with the responsibility of States or NSAG as such. Unlike HRL, IHL seeks to hold perpetrators accountable instead of allowing for individual complaints.¹⁸⁷

3.4 The UN normative and policy framework

Due to the extensive violation of all kinds of children's rights, civil and political as well as economic, social and cultural rights, caused by armed conflicts, the international community adopted a comprehensive normative and policy framework, being aware of the huge impacts of armed conflicts on children. Starting point of the development of the UN framework was the publication of the so-called Machel report in 1996 on the impacts of armed conflicts on children which one year later led to the appointment of the Special Representative of the Secretary General for children and armed conflict (SRSG-CAAC), recommended¹⁸⁸ by the UN General Assembly (GA).¹⁸⁹ In close collaboration with the Committee of the Rights of the Child and the Human Rights Council, the SRSG-CAAC is mainly responsible for the promotion, advocacy for and protection of the rights of the child affected by armed conflicts as well as awareness-raising, the strengthening of international cooperation and the support of the Secretary-General of the UN (UNSG) with the gathering of information relevant for the preparation of the annual report on children and armed conflicts to the UN Security Council (SC).¹⁹⁰ One of the key achievements of the SRSG-CAAC was the proposal of six areas of concern and grave violations of children's rights affected by armed conflicts to the Human Rights Committee in 2005, dealing with a) killing and maiming of children, b) recruiting or using child soldiers, c) attacks against schools or hospitals, d) rape and other forms of sexual violence against children, e) abduction of children and f)

¹⁸⁷ Breitegger (b), 2012, p. 517.

¹⁸⁸ See resolution A/RES/51/77 of the GA adopted on 20 February 1997, at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/51/77 [08.07.2015].

¹⁸⁹ FRAME, Fostering Human Rights Among European Policies, Report on the survey study on human rights violations in conflict-settings, D10.1, 2014, pp. 124-125.

¹⁹⁰ OSRSG-CAAC, Our Work, at <https://childrenandarmedconflict.un.org/mandate/our-work/> (consulted on 8 July 2015).

denial of humanitarian assistance to children.¹⁹¹ According to the SRS-CAAC the use of explosive weapons, such as Cluster Munitions, in populated areas is linked to at least four of those grave violations.¹⁹² In this context, landmark Resolution 1612, adopted by the SC in 2005 and referred to by the CCM,¹⁹³ is of utmost importance. It established the Monitoring and Reporting Mechanism (MRM) of the above mentioned six violations, as well as the Security Council Working Group on children and armed conflict (SCWG-CAAC), in charge of the review of the implementation and the work of the MRM.¹⁹⁴ Resolutions 1882¹⁹⁵ of 2009 and resolution 1998¹⁹⁶ of 2011 expanded the possibility to establish a MRM country team, which was initially only possible in cases of recruitment and use of children as soldiers, also to instances of killing and maiming, rape and other sexual violence as well as attacks against schools or hospitals. States and/or non-state actors, committing those violations, are listed by the UNSG in his or her annual report¹⁹⁷ on children and armed conflicts, based especially on the data collected by the MRM. In the last report of the UNSG, it is noted that armed conflicts cause a disproportionate impact on children due to the use of explosive weapons, leading to a significant spike in the killing and maiming of children.¹⁹⁸ When it comes to the use of Cluster Munitions, the principles of the prohibition of killing and maiming civilians including children and the right not to be deprived of their life, guaranteed by IHL and HRL as well as international jurisprudence are repeatedly violated.¹⁹⁹ In addition to the before mentioned resolutions, the SC adopted eight other resolutions on children and armed conflicts between 1999 and June 2015 dealing with the protection of

¹⁹¹ UNICEF, Implementation Handbook for the Convention on the Rights of the Child, 2007, pp. 578-579.

¹⁹² Save the Children, Explosive weapons and grave violations against children, 2013, p. 3.

¹⁹³ Preambular paragraph 15 of the CCM, op.cit.

¹⁹⁴ Security Council, Resolution 1612, UN Doc. S/ Res/1612 (2005), available at [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1612\(2005\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1612(2005)) [08.07.2015].

¹⁹⁵ Security Council, Resolution 1882, UN Doc. S/ Res/1882 (2009), available at [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1882\(2009\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1882(2009)) [08.07.2015].

¹⁹⁶ Security Council, Resolution 1998, UN Doc. S/ Res/1998 (2011), available at [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1998\(2011\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1998(2011)) [08.07.2015].

¹⁹⁷ For the list of the annual reports since 2000 see <http://watchlist.org/secretary-general-annual-reports-to-the-security-council-on-children-and-armed-conflict/> (consulted on 8 July 2015).

¹⁹⁸ UNSG, Annual report on children and armed conflict, UN Doc. S/2014/339 (2014), available at <http://watchlist.org/wordpress/wp-content/uploads/S-2014-339-2014-SGs-CAC-report.pdf> [08.07.2015].

¹⁹⁹ SRS-CAAC, The Six Grave Violations Against Children During Armed Conflict: The legal foundation, 2013, pp. 14-15.

children affected by armed conflicts and thereby developed a strong as well as comprehensive normative and policy framework.²⁰⁰

²⁰⁰ FRAME, Fostering Human Rights Among European Policies, Report on the survey study on human rights violations in conflict-settings, D10.1, 2014, pp. 125-127.

4. The implementation of the Convention on Cluster Munitions

In the next chapter, the present thesis deals with the concrete implementation of the CCM. First, it covers the implementation process of the CCM as well as the mechanisms at its disposal to give effect to the Convention, such as treaty meetings and transparency measures. Secondly, the VAP and the actions to be taken by the SP in order to implement the CCM properly are discussed. The main part of the final chapter deals with a CRBA to the implementation of the CCM. It tries to define such an approach as well as areas of action in order to guarantee the rights of the child when it comes to the use of Cluster Munitions.

4.1 Implementation of the Convention on Cluster Munitions

It is one of the most fundamental principles of international law to adopt domestic measures in order to implement the CCM effectively. SP have to take a variety of actions and measures to target the far-reaching obligations of the Convention not only in terms of the prohibitions covered in Article 1 but also the Convention's positive requirements; in particular those dealt with in chapter three of the thesis.²⁰¹ Moreover, the collective responsibility of the SP in fulfilling the obligations of the Convention has to be ensured whereas circumvention of the duties must be avoided. Therefore, the Convention has several formal and informal procedures of supervision of the implementation at hand.²⁰²

²⁰¹ Gro & Casey-Maslen, 2010, pp. 477-478.

²⁰² Hayashi, 2012, p. 337.

4.1.1 National Implementation Measures

The legal basis for the obligation of the SP to the CCM to implement their obligations, besides other provisions that require national actions, is Article 9 CCM. According to this Article, SP shall take all appropriate legal, administrative and other measures to implement this Convention, including the imposition of penal sanctions to prevent and suppress any activity prohibited to a SP under this Convention undertaken by persons or on territory under its jurisdiction or control.²⁰³ The duty to ensure the fulfilment of the Convention, once again, goes one step further than other IHL instruments such as the APMBC. Whereas other weapon treaties only refer to the suppression and prevention of prohibited acts, the CCM is very broad by expressing that also positive requirements have to be implemented. Appropriate measures have to be taken to implement *all* of the obligations under the Convention. The CCM does not define what constitutes an appropriate measure which gives SP an extensive margin of appreciation. This broad and open-ended formulation can be explained by the diverse legal and governmental systems of the SP, the diverging kinds of provisions and the different implementation strategies of the states. It does not mean that SP cannot approve measures that go further than the standards set in the Convention as long as they are in line with the legally binding definitions of Article 2 CCM. However, in order to constitute an *appropriate measure*, it has to be consistent with the object and purpose of the Convention. Furthermore, measures are considered to be appropriate if they are necessary for the implementation of the Convention.

Likewise the CCM does not explicitly say which kind of legal or administrative measures have to be taken or which actions are meant by *other measures*. Legal measures are assumed to be national legislation, regulations and decrees which are legally binding whereas administrative measures comprise orders, procedures, policies, instructions and regulations without the force of law. Most of the provisions containing positive obligations already prescribe specific domestic actions SP have to undertake, for example the very broad Article 5 on victim assistance, and, in general, require a combination of policies, orders, guidelines, programmes, regulations, legislations and

²⁰³ Art. 9 CCM, op. cit.

other measures. Other actions are neither legal nor administrative measures but measures which are essential for the full implementation of the Convention such as the promotion of universality of the Convention or the participation at meetings of SP or other meetings. Another feature of Article 9 CCM is the imposition of penal sanctions. It is the only specific measure foreseen in this Article and requires the prohibition of acts prohibited by the Convention under criminal law. The compliance with this obligation will presumably demand for an amendment to existing penal laws, the adoption of a new act as well as the establishment of penal sanctions equivalent to the severity of the violation. In this regard, exceptions under Article 3 CCM have to be taken into account. Moreover, those acts have to be committed by *persons or on territory* under the *jurisdiction or control* of the SP which concerns the scope of the measures. The wording of the phrase implies that the prohibited activity has to occur within the territory of the SP or in a region where the state has jurisdiction or control or has to be undertaken by a national of the state and hence requires the application of extraterritorial jurisdiction of Article 9 CCM.

Finally, the Article does not provide a definition of *person* which can be both, a natural person, meaning individuals, as well as a legal person such as corporations and companies. The concrete implementation will very much depend on the national law of the SP, but already existing practices of the states to hold legal persons criminally liable as well as the purpose of the Convention, argue for a comprehensive reading of the term.^{204, 205}

4.1.2 Treaty Meetings

One of the main instruments to evaluate the effectiveness of the implementation of the Convention and the progress made by the SP are regular meetings of the states²⁰⁶ also open for other relevant stakeholders such as NGOs and international organisations. So far, there have been five meetings of SP in Lao PDR, Lebanon, Norway, Zambia and

²⁰⁴ Gro & Casey-Maslen, 2010, pp. 473-490.

²⁰⁵ Blazeby, 2009, pp. 723-726.

²⁰⁶ Art. 11 CCM, op. cit.

Costa Rica.²⁰⁷ The results of those meetings are non-binding documents which are, however, useful to understand the views of the states on how to implement their obligations.²⁰⁸ In order to facilitate the implementation and to assess improvements, SP decided to hold Coordination Committee Meetings²⁰⁹ and additional annual informal *intersessional meetings* in Geneva with the participation of all relevant stakeholders. Those meetings, the fifth of which took place in June 2015,²¹⁰ are not provided for by the Convention itself, but are inspired by the practice to convene intersessional meetings in the context of the APMBC. The same applies to the establishment of an Implementation Support Unit (ISU) contributing to an effective application of the Convention²¹¹ which is already foreseen by the SP.²¹² Until now there have also been several regional meetings, aiming at universal adherence to the Convention and the support of SP to comply with their duties.²¹³ Furthermore, Article 12 CCM schedules the holding of a *review conference* five years after the entry into force for the revision of the *status and operation* of the Convention. In September 2015, the SP to the CCM will convene for the first Review Conference in Dubrovnik, Croatia.^{214, 215}

All these formal treaty meetings and informal assemblies constitute a vital platform to find solutions, to take actions, to persuade, to exchange data, views and best practices as well as to discuss all issues related to Cluster Munitions and children. Moreover, this kind of transparency and monitoring is able to generate pressure by influencing action of states which want to protect their reputation and by providing information to the civil

²⁰⁷ Convention on Cluster Munitions, Meetings of State Parties, at <http://www.clusterconvention.org/meetings/msp/> (consulted on 8 July 2015).

²⁰⁸ Hayashi, 2012, p. 335.

²⁰⁹ Convention on Cluster Munitions, Coordination Committee Meetings, at <http://www.clusterconvention.org/documents/cc-meetings/> (consulted on 8 July 2015).

²¹⁰ Convention on Cluster Munitions, Intersessional Meetings, at <http://www.clusterconvention.org/meetings/intersessional-meetings/> (consulted on 8 July 2015).

²¹¹ Gro & Casey-Maslen, 2010, p. 498.

²¹² Convention on Cluster Munitions, Open-ended consultations on CCM ISU, at <http://www.clusterconvention.org/work-programme/open-ended-consultations-on-ccm-isu/> (consulted on 8 July 2015).

²¹³ Convention on Cluster Munitions, Regional Meetings, at <http://www.clusterconvention.org/meetings/regional-meetings/> (consulted on 8 July 2015).

²¹⁴ Convention on Cluster Munitions, Review Conference, at <http://www.clusterconvention.org/meetings/lrc/> (consulted on 8 July 2015).

²¹⁵ Gro & Casey-Maslen, 2010, p. 507.

society which plays a comparatively strong and prominent role in monitoring the implementation of the CCM as under the APMBC. Although there are no sanctions for non-compliance provided for by the Convention, it is in the interest of the SP, which are under considerable pressure, to deliver information in order to receive appropriate recommendations and assistance of other states.²¹⁶ Because of the non-legally binding character of the issued documents, such as the VAP, the frequency of the meetings needs to be increased in order to achieve the desired results.²¹⁷

4.1.3 Transparency Measures

Another tool to promote compliance and to assess the status of implementation of the Convention are transparency reports. According to Article 7 CCM, SP shall submit an initial report to the UNSG within 180 days after the entry into force of the Convention and in the following provide annually updated reports, not later than on 30 April every year;²¹⁸ the report should focus on 14 subjects such as national implementation measures, measures regarding risk education and victim assistance as well as on relevant information concerning the size, location and number of submunitions.²¹⁹ After receiving the transparency reports, the UNSG is required to transfer them to the SP.²²⁰ The comprehensive issues SP are obliged to report on, are ground-breaking in disarmament law. Transparency creates an atmosphere of trust, helps to overcome challenges and hurdles, to identify the assistance needed, to exchange best practices and information, to monitor the implementation process, to generate pressure through knowledge of the civil society about the efforts of the SP, to foster cooperation and to altogether contribute to the achievement of the aims of the Convention.²²¹

²¹⁶ Hayashi, 2012, pp. 337-339.

²¹⁷ *Idem.*, p. 341.

²¹⁸ Art. 7 (1)-(2) CCM, *op. cit.*

²¹⁹ Art. 7 (1) (a)-(n) CCM, *op. cit.*

²²⁰ Art. 7 (3) CCM, *op. cit.*

²²¹ Gro & Casey-Maslen, 2010, pp. 422-424.

4.1.4 Facilitation and Clarification of Compliance and Dispute Settlement

A different procedure of supervision is delineated in Article 8 of the Convention which concerns the facilitation and clarification of compliance. SP agree to consult and cooperate with each other regarding the implementation of the provisions of this Convention and to work together in a spirit of cooperation to facilitate compliance by SP with their obligations under this Convention.²²² Through the UNSG *any* SP can ask for clarification of a matter of compliance with the Convention by another SP. The addressed state shall provide all information at its disposal within 28 days so as to clarify the issue satisfactorily for the requesting SP which is otherwise entitled to submit the question to the next meeting of SP. To answer the request, states have to take action in advance with respect to the empowerment of a Minister or other official who is qualified to provide relevant information and who is also able to fulfil the reporting obligations under Article 7 of the Convention on behalf of the state.²²³ The meeting of SP is thereupon competent to suggest means in order to solve and clarify the issue, to adopt procedures as well as to draft a resolution.²²⁴ In addition, it may recommend cooperative measures according to Article 6 of the Convention.²²⁵ Besides the other formal mechanisms of supervision discussed before, this procedure is able to contribute to the better implementation of the Convention. Although the measures taken by the meeting of SP are only recommendations, all SP, as a whole, are in the spirit of collective responsibility concerned with matters of compliance. Especially by putting every SP in the position to start the procedure, for example, with regard to victim assistance, this instrument is very progressive and facilitates the participation of all states in the implementation process.²²⁶

Finally, the Convention has an instrument available to resolve disputes between SP. According to Article 10, SP shall consult together by negotiation or by other peaceful means, including recourse to the meeting of SP and referral to the ICJ, in order to settle

²²² Art. 8 (1) CCM, op. cit.

²²³ Blazeby, 2009, p. 726.

²²⁴ GICHD, A Guide to Cluster Munitions, 2009, p. 41.

²²⁵ Art. 8 (5) CCM, op. cit.

²²⁶ Hayashi, 2012, pp. 339-340.

disputes relating to the interpretation or application of the Convention.²²⁷ The role of the meeting of SP is rather a consolidating and recommending one and should encourage states to solve their disagreements and to comply with their commitments.²²⁸ Together with Article 8, which operates on an international level and which is less adversarial than Article 10, as well as Article 9, working on a national level, they establish a system to ensure SP compliance with its positive and negative obligations.²²⁹

4.2 The Vientiane Action Plan

On 12 November 2010, in the course of the first meeting of SP in Vientiane, Lao PDR, SP to the CCM adopted a plan, the VAP, so as to ensure efficient and timely application of the Convention. The non-legally binding plan²³⁰ seeks to support SP in meeting their obligations by translating them into 66 concrete actions and targets which should be achieved within a specific timeframe. The measurable targets of the VAP render it possible to monitor the implementation process of the Convention by the SP and represent priorities of the states.²³¹ Its aim is to ensure immediate impact on the ground, to address current implementation challenges, to react to future developments and to reflect changes in implementation challenges.²³² The actions dedicated to partnerships, universalisation, stockpile destruction, clearance and destruction of Cluster Munition remnants and risk education activities, victim assistance, international cooperation and assistance, action in support of implementing Implementation support, transparency and exchange of information, national implementation measures and compliance should structure and guide the response of the SP to their commitments.²³³ By defining roles and responsibilities for the implementation of the obligations, the collective responsibility of the SP and the shared concern over Cluster Munitions is expressed in

²²⁷ Art.10 (1) CCM, *op. cit.*

²²⁸ Hayashi, 2012, pp. 340-341.

²²⁹ Gro & Casey-Maslen, 2010, p. 455.

²³⁰ *Idem.*, p. 341.

²³¹ Convention on Cluster Munitions, Vientiane Action Plan, at <http://www.clusterconvention.org/the-convention/action-plan/> (consulted on 8 July 2015).

²³² Para. I (4) Vientiane Action Plan, (adopted 12 November 2010 by the CCM States Parties) CCM/MSP/2010/5.

²³³ Para. I (3) VAP, *op. cit.*

18 actions assigned to international cooperation and assistance.²³⁴ The more relevant actions of the VAP for the purpose of this thesis regarding victim assistance (actions 20-32) and risk reduction activities (actions 10-19) are specifically dealt with in the following section.

4.2.1 Actions in terms of victim assistance and risk reduction

Victim assistance according to Article 5 CCM and IHL as well as HRL is a legal obligation of the SP, trying to mitigate the consequences caused by the use of Cluster Munitions. Like the CRC, the gaps between the ambitious aims of the humanitarian orientated provisions of the CCM as well as the VAP, which requires the designation of a focal point and coordination of all efforts, a needs assessment and the collection of data disaggregated by age and sex, to ensure the existence of an effective national action plan, the improvement of the accessibility, availability and quality of services as well as the national laws and policies, awareness-raising, the implementation of international standards and guidelines, resource mobilisation, gender and age equality, capacity building and ownership, inclusion and participation,²³⁵ are enormous. So far, only 12 countries²³⁶ with Cluster Muniton victims ratified the CCM. Out of those Chad and Guinea Bissau did not even submit their initial report,²³⁷ Sierra Leone as well as Guinea Bissau did not designate a focal point, only 9 countries involved their victims in assistance activities²³⁸ and only 6 countries conducted awareness-raising activities. The allocation of resources, the provision of the care needed, in particular emergency medical care, as well as the access to all required services, such as rehabilitation services, which is especially important for children, socio-economic inclusion of all

²³⁴ Hayashi, 2012, pp. 335-336.

²³⁵ Actions 20-32 VAP. *op. cit.*

²³⁶ Afghanistan, Albania, Bosnia and Herzegovina, Chad, Croatia, Guinea Bissau, Iraq, Lao People's Democratic Republic, Lebanon, Montenegro, Mozambique and Sierra Leone.

²³⁷ Convention on Cluster Munitions, Transparency Report, at

<http://www.clusterconvention.org/documents/transparency-reports/> (consulted on 8 July 2015).

²³⁸ Landmine and Cluster Muniton Monitor, Cluster Muniton Monitor 2014, 2014, p. 48.

persons affected by Cluster Munitions and mainly the collection of age and gender aggregated data remain some of the biggest challenges in the implementation process.²³⁹

Concerning the clearance of Cluster Munition remnants and risk reduction, SP to the CCM can record more successes in implementing their obligations according to Article 4 CCM and in applying actions 10-19 VAP. Those call for capacity building, measures to be taken to prevent further civilian casualties, reporting on location and size of contaminated and released areas, the development of national clearance plans, the inclusion and information of affected communities, the application of methods for survey and clearance, the provision of risk reduction education programmes, the support of affected states as well as the monitoring and promotion of the clearance activities.²⁴⁰ Of the SP to the CCM, 16 countries²⁴¹ were obliged to fulfil their clearance obligations. Through efficient surveys, advanced technical and clearance methods, allocation of funds, international cooperation and the sharing of best practices, those SP could quickly achieve some remarkable results; in fact, five states already fulfilled their clearance obligations.²⁴² However, in addition to those 11 SP who have still not finished releasing their lands, another 12 countries and 3 other regions are contaminated as well as 15 more states, for which, however, the contamination could not be confirmed. Also in this regard hurdles such as the inclusion of the affected communities in the clearing process as well as consistent and complete reporting need to be overcome.²⁴³

In the previous chapters, the present thesis already analysed the situation of children living in Cluster Munition contaminated areas and discussed which challenges they face. It tried to provide an overall picture of the scale and severe consequences of Cluster Munitions on children and sought to examine the duties of the states in terms of HRL and disarmament law, in particular the CCM, the CRC and the CRPD, and it tried to outline the most important rights of children. Furthermore, it attempted to illustrate

²³⁹ Vientiane Action Plan Review, 2014, p. 15.

²⁴⁰ Actions 10-19 VAP. *op. cit.*

²⁴¹ Afghanistan, Albania, Bosnia and Herzegovina, Chad, Chile, Croatia, Germany, Grenada, Iraq, Lao People's Democratic Republic, Lebanon, Mauritania, Montenegro, Mozambique, Norway and Zambia.

²⁴² Vientiane Action Plan Review, 2014, p. 13.

²⁴³ Landmine and Cluster Munition Monitor, Cluster Munition Monitor 2014, 2014, pp. 35-39.

how to implement the CCM in theory and identified the main challenges in this regard. The main part of the last chapter now deals with a comprehensive CRBA to the implementation of the CCM by defining the approach and the key elements it should include as well as the main areas of actions, before providing some recommendations and suggesting some actions to be taken in the conclusions of this piece of work.

4.3 A comprehensive CRBA to the implementation of the CCM

There is no internationally agreed definition of what constitutes a CRBA. In line with the UN Common Understanding among UN agencies of 2003, called for by the UNSG in order to mainstream various human rights activities and in particular development cooperation,²⁴⁴ UNICEF established a human rights-based approach to programming, meaning that a) the aim of all Country Programmes of Cooperation, including in humanitarian situations, is to further the realisation of the rights of all children and women, b) human rights and child rights principles guide programming in all sectors at all phases of the programme process and c) Programmes of Cooperation focus on developing the capacities of duty-bearers, at all levels, to meet their obligations to respect, protect and fulfil rights as well as on developing the capacities of right-holders to claim their rights.²⁴⁵ According to this approach children have rights (right-holders) which have to be fulfilled by those who have obligations to act (duty-bearers), mainly the states but also parents, communities and the civil society. If those actors are unwilling or unable to guarantee children's rights, for example, because of the lack of capacities, children have claims against them. Therefore, the international community should analyse and monitor the situation of children so as to identify those rights not fulfilled and if so to support children to articulate their claims through advocacy and awareness-raising. Moreover, duty bearers and their obligations should be determined in order to ensure that the rights of the child are properly implemented and to support them in case of lack of resources or capacities. This process is based on the provisions and

²⁴⁴ Interagency Workshop on a Human Rights based Approach, The Human Rights Based Approach to Development Cooperation, 2003, p. 1.

²⁴⁵ UNICEF, Programme Policy and Procedure Manual, 2007, pp. 5-6.

principles of the CRC as well as other international human rights treaties.²⁴⁶ Similarly, the UN Office of the High Commissioner on Human Rights defines a human rights-based approach as a conceptual framework based on international human rights norms, standards, principles and guidelines, which seek to promote and to protect human rights and the dignity of human beings through their incorporation into plans, policies and programmes of action. This should be achieved by means of identifying duty-bearers and their obligations, rights-holder and their entitlements as well as their claims if their rights are unmet, and by supporting and holding accountable the duty-bearers not complying with their obligations. This approach takes into account that the fulfilment of human rights is a moral and legal obligation (intrinsic rationale) and that it leads to a greater impact on the realisation of the entitlements (instrumental rationale).²⁴⁷



Diagram 6: Rights-holder/Duty-bearer relationship²⁴⁸

Translated into the context of children’s rights, a CRBA puts children in the centre of all considerations and in particular tries to improve the lives of children, to achieve the implementation and the fulfilment of children’s rights, to empower children, to support them claiming their rights against those accountable for not meeting their human rights

²⁴⁶ UNICEF, Programme Policy and Procedure Manual, 2007, pp. 7-8.

²⁴⁷ OHCHR, Frequently asked questions on a human rights-based approach to development cooperation, 2006, pp. 15-16.

²⁴⁸ Save the Children, Child Rights Programming, 2005, p. 36.

obligations towards children, to allow for their participation, being aware of the specific vulnerabilities and needs of children and young adolescents, and in general to mainstream children's rights in all actions affecting them.²⁴⁹ Such an approach is mainly based on the provisions and principles of the CRC but also on other international human rights standards as well as IHL, because as already noted above, the rights provided for by the CRC are also applicable in cases of armed conflicts. In particular Article 38 and 39 CRC require states to also respect the rules of IHL as well as to promote physical and psychological recovery and social reintegration of child victims.²⁵⁰ Drawing upon the definition of *child rights programming* according to Save the Children, a CRBA to the implementation of the CCM could mean "taking into account the principles and standards of human rights and especially children's rights in all implementation activities and efforts of the SP to the CCM with the overall goal of improving the lives of children and their families affected by Cluster Munitions so that all boys and girls can fully enjoy their rights and can live in dignity and societies that acknowledge and respect children's rights."²⁵¹

Therefore, a CRBA to the implementation of the CCM should constitute a new concept based on legally binding obligations deriving from international human rights and humanitarian law treaties. Furthermore, it should be founded on the broader overall and fundamental human rights standards (in the following called principles) and the narrower fundamentals of the CCM, the CRC and the CRPD (henceforth called key elements of the approach) both of which should be equally important. Among the overall human rights principles which should be considered when applying a CRBA are the principles of universality, indivisibility and interdependence, inalienability and accountability:

²⁴⁹ Save the Children, *Child Rights Programming*, 2005, pp. 23-26.

²⁵⁰ UNICEF, *Programme Policy and Procedure Manual*, 2007, pp. 9-13.

²⁵¹ Save the Children, *Child Rights Programming*, 2005, p. 26.

a) Universality

The principle that all human rights are universal has its legal basis in Article 1 UDHR which lays down that all human beings are born free and equal in dignity and rights.²⁵² It means that all persons, including children, are entitled to those rights no matter where they are. Regarding children's rights it signifies that each child enjoys those rights at any time, everywhere in the world, and, therefore, also in situations of armed conflicts, regardless of their race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.²⁵³ The overall goal of this principle is to prevent inequality, exclusion and discrimination which should be assessed by a human rights-based approach through the collection of data regarding, for example, age and gender. Applying a CRBA to the implementation to the CCM would hence require that all children equally benefit from actions taken by the SP, although the most disadvantaged children need to be prioritised in order to allow that all children realise their rights equally.²⁵⁴

b) Indivisibility

All human and children's rights, regardless of their qualification as civil, political, social, cultural or economic right, are equally important.²⁵⁵ The enjoyment of one right cannot be based on the violation of other human rights. In order to implement and achieve the fulfilment of the rights contained in the CRC, a CRBA has to take into account and respect all rights which are equal in status and inherent in the dignity of every human person. Nonetheless, due to practical reasons, a CRBA to the implementation of the CCM needs to focus on the rights mainly affected by the use of Cluster Munitions; however, it still has to be comprehensive and holistic at the same time.²⁵⁶

²⁵² GA, Universal Declaration of Human Rights, Resolution A/RES/217 (1948).

²⁵³ Art. 2 CRC, *op. cit.*

²⁵⁴ UNICEF, Programme Policy and Procedure Manual, 2007, p. 9.

²⁵⁵ Interagency Workshop on a Human Rights based Approach, The Human Rights Based Approach to Development Cooperation, 2003, p. 2.

²⁵⁶ UNICEF, Programme Policy and Procedure Manual, 2007, p. 9.

c) Inalienability

Human rights are inalienable; that is they are inherent in every human being and nobody can voluntarily abandon his or her rights nor can they be withdrawn.²⁵⁷ According to this principle every person has rights from the moment of birth until death and that children in particular are holders of children's rights from the second they are born until they reach the age of eighteen as defined by Article 1 CRC. Therefore, a CRBA has to focus on the realisation of the rights of persons below the age of 18 and cannot take away or disregard their rights only because they live inter alia in a Cluster Munitions contaminated area.²⁵⁸

d) Accountability

As already noted above, the CRC is an almost universally ratified human rights treaty and the CCM has already been ratified by more than 90 states. Through the ratification of a treaty, states acknowledge that they have obligations towards the right-holders, such as children, which can claim their rights if they are unfulfilled. The principle of accountability prescribes that duty-bearers are legally accountable for not implementing or providing for the full enjoyment of rights they are committed to respect, protect and fulfil.²⁵⁹ Although states are the main duty-bearers, it has to be taken into account that also parents, communities and other stakeholders have obligations towards the fulfilment of children's rights.²⁶⁰ A CRBA to the implementation of the CCM would therefore intend to, inter alia, guarantee the rights of the child by holding SP accountable for not complying with their legal and moral obligations towards children and by supporting them to meet their duties²⁶¹ in case of lack of resources, authority or political will and to make the well-being of children a priority and a primary consideration of all actions taken. A system of rights and duties, in which duty-bearers make the rights of children accessible and in which adults and children are empowered

²⁵⁷ Interagency Workshop on a Human Rights based Approach, The Human Rights Based Approach to Development Cooperation, 2003, p. 2.

²⁵⁸ Save the Children, Child Rights Programming, 2005, p. 30.

²⁵⁹ UNICEF, Programme Policy and Procedure Manual, 2007, p. 11.

²⁶⁰ Save the Children, Child Rights Programming, 2005, p. 30.

²⁶¹ Collins, Pearson & Delany, 2002, p. 4.

to claim their rights and hold duty-bearers accountable, needs to be established through awareness-raising and other measures.²⁶² The different levels of such a system are illustrated in the following diagram of Save the Children:

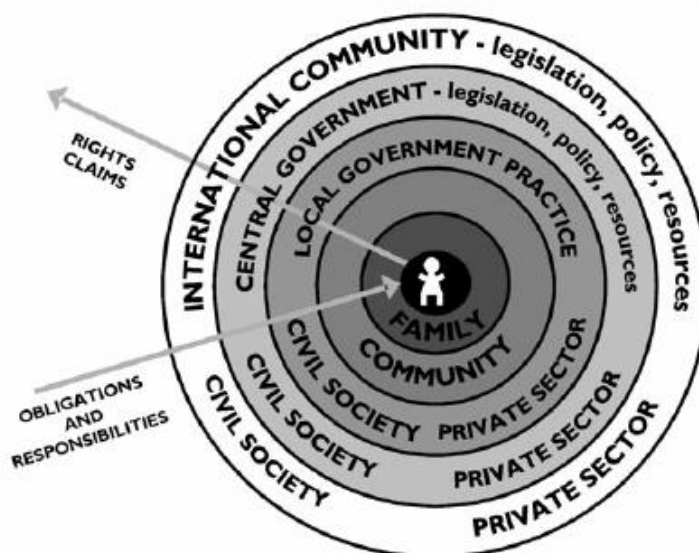


Diagram 7: Levels of obligations and duties within the society²⁶³

4.3.1 Key elements of a CRBA to the implementation of the CCM

After defining what could be meant by a CRBA as well as summarising the overall human rights principles on which the CRBA is based, it seems necessary to sketch which elements it should include.

4.3.1.1 Best Interest of the Child

One of the four general principles of the CRC, laid down in Article 3 of the Convention, is that the best interest of the child should be a primary consideration in all actions concerning children. Once again, the Convention does not define the exact meaning of this principle. However, the Committee of the Rights of the Child tries to describe it in

²⁶² Save the Children, Child Rights Programming, 2005, pp. 36-38.

²⁶³ Idem., 2005, p. 38.

its General Comments regarding specific issues and circumstances such as unaccompanied children. A CRBA, respecting the best interest of the child, is a child-centred approach²⁶⁴ which requires governments but also private entities to assess and to evaluate the impact of their actions in view of the full enjoyment of all rights contained in the CRC and needs to take into account all general principles of the Convention (child impact assessment and evaluation). In the case of the use of Cluster Munitions the well-being of children is extremely threatened. Therefore, primarily states have the legal obligation to take positive actions in order to ensure, promote and protect the rights guaranteed by the CRC and to provide the necessary care and protection²⁶⁵ because parents are usually not in the position to do so.²⁶⁶ When implementing the CCM, action taken by the SP shall inter alia assess and take into account the views and opinions of children as well as other stakeholders, the impacts of their measures on the enjoyment of the rights of the child, their needs, capacities and specific vulnerabilities.²⁶⁷

4.3.1.2 Protection

Armed conflicts endanger children's right to life and have severe consequences on their right to survive and to develop.²⁶⁸ The CRC and other international treaties comprehensively cater for the protection of children from harms such as the impacts of Cluster Munitions. In order to ensure the well-being of children, they have to be prevented to become victims of Cluster Munitions which requires the establishment of a protective environment free from violence, injury, abuse, neglect and exploitation²⁶⁹ as well as the reduction of risk factors such as UXOs, accountable for the specific vulnerability of children²⁷⁰ due to disabilities, displacement, diseases, exclusion, orphaning or inaccessibility to basic social services. Measures taken to implement the

²⁶⁴ UNICEF, Programme Policy and Procedure Manual, 2007, p. 10.

²⁶⁵ Art. 3 (2) CRC, op. cit.

²⁶⁶ UNICEF, Implementation Handbook for the Convention on the Rights of the Child, 2007, pp. 35-42.

²⁶⁷ Save the Children, Child Rights Programming, 2005, pp. 32-33.

²⁶⁸ Art. 6 CRC, op. cit.

²⁶⁹ Art. 19 CRC, op. cit.

²⁷⁰ Economic and Social Council, UNICEF Child Protection Strategy, 2008, pp. 1-2.

CCM, applying a CRBA, should hence minimise those impacts causing the extreme vulnerability of children.²⁷¹ In this context the facilitation of capacities and capabilities of children and young adolescents as well as of those responsible for the protection of their right to life is of great importance. Through training, education and awareness-raising children are in the position to protect themselves from the impacts of Cluster Munitions, or to be protected from their parents and communities, who should be able to react appropriately and promptly in the case of an incident and to adequately deal with Cluster Munition victims, leading to enhanced survival chances and a comprehensive physical, mental, cultural, spiritual, moral and social development²⁷² of the child.²⁷³ The protection of the life of the child is a legal obligation from which derogation is not possible, even in times of armed conflicts.²⁷⁴ Consequently, a CRBA focuses on the prevention of the harm in the first place, supports SP to meet their obligations as well as strengthens their and the children's capacities and accordingly holds them accountable if not doing so.²⁷⁵

4.3.1.3 Non-Discrimination

The principle of non-discrimination based on any ground such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status²⁷⁶ is another fundamental principle of the CRC and other human rights treaties. SP to the Convention shall take all appropriate measures to ensure that children as a group, as an individual and with certain characteristics such as disabilities, are protected against all forms of discrimination²⁷⁷ although priority shall be given to the most marginalized ones. Therefore, all actions taken by SP in order to implement the CCM need to be inclusive and non-discriminatory, which requires an assessment of the situation and the collection of data so as to tackle the discrimination

²⁷¹ Landgren, 2005, pp. 225-226.

²⁷² Save the Children, Child Rights Programming, 2005, p. 35.

²⁷³ Garzón et al., 2014, pp. 25-26.

²⁷⁴ UNICEF, Implementation Handbook for the Convention on the Rights of the Child, 2007, p. 90.

²⁷⁵ Economic and Social Council, UNICEF Child Protection Strategy, 2008, pp. 1-2.

²⁷⁶ Art. 2 (1) CRC, op. cit.

²⁷⁷ Art. 2 (2) CRC, op. cit.

of children with appropriate measures.²⁷⁸ The principle is furthermore expressed in Article 5 CCM, avoiding the discrimination between Cluster Munition victims and, in general, those victims who have suffered injuries or disabilities from other causes. Differences in treatment should be based only on medical, rehabilitative, psychological or socio-economic needs.²⁷⁹ Despite this legal obligation, discrimination based on age, gender and regional groups remains a challenge.²⁸⁰ Hence, a CRBA in terms of victim assistance measures would require the inclusion of children with disabilities as such as well as respond to the differences and specific needs of different groups of child victims. The enormous impacts of disabilities on the development of the child need to be addressed through their inclusion in all actions taken by the SP, not only in terms of victim assistance, and in particular through the access to programmes no matter where they are living.²⁸¹ By obliging SP not to discriminate among children with disabilities, Article 5 CCM is beneficial for all children who are confronted with similar challenges as Cluster Munition victims and contributes to the enjoyment of children's rights of a much larger group.²⁸² Moreover, those responsible for the delivery of victim assistance should be guided by the principle of impartiality, laid down in the GCs and the Code of Conduct of NGOs and the Fundamental Principles of the Red Cross and the Red Crescent Movement.²⁸³

4.3.1.4 Participation and empowerment

To hear and to listen to the voices of children at all levels, to regard children as active right-holders and to respect their evolving capacities²⁸⁴ to take their own decisions is an

²⁷⁸ Save the Children, *Child Rights Programming*, 2005, pp. 31-32.

²⁷⁹ Art. 5 (2) (e) CRC, *op. cit.*

²⁸⁰ Landmine and Cluster Munition Monitor, *Cluster Munition Monitor 2014*, 2014, p. 49.

²⁸¹ UNICEF, *Guidance on Child-focused Victim Assistance*, chapter 4, 2014, p. 22.

²⁸² Gro & Casey-Maslen, 2010, p. 371.

²⁸³ Careacademy, *A Child Rights-Based Approach to Emergencies*, at <http://www.careacademy.org/START/Documents/Module%204/A%20Child%20Rights%20-%20Based%20Approach%20to%20Emergencies.pdf> (consulted on 28 June 2015).

²⁸⁴ Art. 5 CRC, *op. cit.*

important principle of the CRC.²⁸⁵ It is expressed in Article 12 and states that SP shall assure the child, who is capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.²⁸⁶ Furthermore, the CRC provides for the right to information, freedom of expression as well as association and assembly so as to allow children to claim their rights and especially demand the fulfilment of the general principles. Those “participation rights” are closely related to all the other rights contained in the Convention and are able to mutually strengthen or to weaken each other. Thus, measures taken by the SP to implement the CCM have to seriously acknowledge the opinion of children and to include them in all phases of the implementation process.²⁸⁷ Participation and empowerment of children are important elements of an effective CRBA, leading to social and economic inclusion and integration. By listening to the voices of child victims of Cluster Munitions as well as children with disabilities and by engaging with them through dialogue, they can be a driving force of awareness-raising and advocacy as well as they can contribute to an improved child friendly victim assistance and integration.²⁸⁸ Based on Article 4 (3) CRPD, the CCM²⁸⁹ as well as Actions 30 and 31 of the VAP require close consultation and involvement of Cluster Munition victims in the work of the Convention and, furthermore demand the inclusion of victims as experts in delegations in all Convention related activities.²⁹⁰ The voices of children are crucial for an effective implementation of the CCM and for properly addressing their needs as well as guaranteeing their rights and therefore should never be disregarded.

²⁸⁵ UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, 2007, pp. 149-150.

²⁸⁶ Art. 12 (1) CRC, *op. cit.*

²⁸⁷ Save the Children, *Child Rights Programming*, 2005, pp. 33-34.

²⁸⁸ UNICEF, *Guidance on Child-focused Victim Assistance*, chapter 4, 2014, p. 22.

²⁸⁹ Art. 5 (2)(f) CCM, *op. cit.*

²⁹⁰ *Landmine and Cluster Munition Monitor*, Cluster Munition Monitor 2014, 2014, pp. 48-49.

4.3.1.5 Normativity

A CRBA to the implementation of the CCM should in particular rely on the CCM, the CRC and its OPs as well as the CRPD, the work of the Committee on the Rights of the child and IHL, aiming at the protection of civilians in armed conflicts. Furthermore, it should take into consideration other relevant international human rights treaties, the findings and recommendations of the UN Special Procedures, the actions of the Human Rights Council, the Universal Periodic Review (UPR) as well as the outcomes of the UN normative and policy framework in general. As a main principle, most of the fundamental principles of HRL in general and of the CRC in particular are based on the idea of normativity. It aims at the protection and the fulfilment of all human rights, which are interrelated, interdependent and equal in status and which derive from the international human rights system and especially the UDHR, in all areas and settings, such as armed conflicts, development and humanitarian crises. Therefore, cooperation and partnerships with all relevant human rights actors at regional, national and international level and in particular the UN are vital.²⁹¹

4.3.1.6 Age and Gender Sensitivity

As already described before, it is of huge importance to identify different age groups and to take into account gender dimensions when adopting measures to implement the CCM. Each age and gender group has specific vulnerabilities which have to be addressed by an appropriate CRBA.²⁹² According to Article 5 and preambular paragraph 8 of the CCM, SP to the Convention are required to provide age and gender sensitive assistance to victims of Cluster Munitions as well as to collect corresponding reliable data. So far, the SP have barely provided reliable information in this regard and failed to adopt measures addressing and assessing the specific and extensive needs of girls, boys and adolescents, which is, by now, one of the biggest challenges in the implementation

²⁹¹ UNICEF, *Global Evaluation of the Application of the Human Rights-Based Approach to UNICEF Programming*, 2012, pp. 13-16.

²⁹² UNICEF, *Guidance on Child-focused Victim Assistance*, chapter 4, 2014, p. 22

process.²⁹³ Although men and boys are more likely to become victims of Cluster Munitions, it is often women and girls who face severe discriminations and hurdles, in particular, regarding access to medical and rehabilitative care as well as psychological support²⁹⁴ and who need appropriate attention in order to guarantee their inclusion and recovery.²⁹⁵ Not only children directly affected and disabled by Cluster Munitions are victims of discrimination and in need of special protection, but also those indirectly affected through the loss of family members due to UXOs require specific support.²⁹⁶ This can be traced back to the broad definition of Cluster Muniton victims which goes beyond those directly harmed and which includes families and entire affected communities.

Especially in the area of health, a child sensitive victim approach needs to be adopted in order to address the specific vulnerabilities of children in this regard, who are often more severely injured than adults if becoming victims of Cluster Munitions. The complexities of the wounds of children, which often lead to death or disabilities, require prompt emergency medical response and continuing physical and psychological care and rehabilitation. Unfortunately, children do not often obtain the support needed because adequate health care systems are not in place or inaccessible, professionals with specific skills to deal with the injuries of children are not existent or the medical care needed is unaffordable for the affected families. Thus, in order to take effective measures in terms of victim assistance, they need to be accessible for children, have to be based on the realisation of their human rights and to be incorporated in the broader human rights framework, to be founded on the assessment of the specific needs of children and require national ownership as well as the participation of children in all efforts.²⁹⁷ Main challenges regarding victim assistance are the inclusion of victims into society, an enhanced cooperation between all relevant stakeholders, the incorporation of victim assistance issues into national disability frameworks, the participation of victims in all matters concerning them, the allocation of resources and the assessment of the

²⁹³ Landmine and Cluster Muniton Monitor, Cluster Muniton Monitor 2014, 2014, p. 49.

²⁹⁴ UNICEF, Guidance on Child-focused Victim Assistance, chapter 4, 2014, p. 22.

²⁹⁵ Gro & Casey-Maslen, 2010, pp. 362-363.

²⁹⁶ UNICEF, Guidance on Child-focused Victim Assistance, chapter 4, 2014, p. 22.

²⁹⁷ GICHD, A Guide to Cluster Munitions, 2009, pp. 88-95.

needs of the victims, relevant for an effective assistance.²⁹⁸ A comprehensive CRBA therefore has to be concerned with all social, psychological and economic consequences of Cluster Munitions on the rights of the child depending on their age and gender so as to ensure their full enjoyment and the well-being of children²⁹⁹ and to provide for the equal and child sensitive allocation of support in terms of victim assistance in all actions taken by the SP.³⁰⁰

4.3.1.7 Reintegration and Rehabilitation

Children with disabilities due to Cluster Munitions and other causes are among the most vulnerable, marginalised and discriminated groups and need special protection and care. Physical and psychological recovery as well as social reintegration of a child victim of armed conflicts, fostering health, self-respect and dignity of the child³⁰¹ and taking into account the four general principles of the CRC, similarly stressed by Article 6 (3) of the OP to the CRC on the involvement of children in armed conflicts, should therefore be one of the key elements of a CRBA.³⁰² In this context, it is necessary to refer to Article 26 CRPD, which requires SP to organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services so as to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. For the proper implementation of this provision, SP are requested to provide assistive devices, such as prostheses or wheelchairs, and to take care of the training of professionals working in the field of rehabilitation.³⁰³ Moreover, such services have to be available and inclusive also in rural areas and need to be based on an assessment of the needs of

²⁹⁸ Convention on Cluster Munitions, Victim Assistance, at <http://www.clusterconvention.org/the-convention/operative-commitments/victim-assistance/> (consulted on 8 July 2015).

²⁹⁹ UNICEF, Guidance on Child-focused Victim Assistance, chapter 4, 2014, p. 22.

³⁰⁰ Gro & Casey-Maslen, 2010, pp. 362-363.

³⁰¹ Art. 39 CRC, op. cit.

³⁰² UNICEF, Implementation Handbook for the Convention on the Rights of the Child, 2007, pp. 589-590.

³⁰³ Art. 26 (2)(3) CRPD, op. cit.

persons with disabilities.³⁰⁴ In addition to those far-reaching obligations of Article 26 CRPD, which aim at the well-being, inclusion and participation of disabled people in all areas of life, Article 27 accommodates the economic reintegration of persons with disabilities, through the promotion of the realization of their right to work.³⁰⁵ Children with disabilities due to Cluster Munition often require more extensive and complex physical and psychological care than adults, which is often very expensive and needed for a long period of time owing to their continuing growth and youth. Given the fact that children are also very much dependent on their parents and communities, a CRPA needs to focus on their autonomy, recovery and inclusion through principles of equality, opportunity, accessibility, participation and the evolving capacities of the child and to empower children, as well as those persons responsible for them, to claim their rights.³⁰⁶

4.3.1.8 Recreation and Culture

As a result of the existence of Cluster Munition submunitions, in particular children are impeded to enjoy their rights to rest and leisure, to engage in play and recreational activities appropriate to their age and to participate freely in cultural life and arts.³⁰⁷ The implementation of the main obligations of the CCM such as the clearance of contaminated areas, risk reduction, marking and fencing as well as awareness-raising among the affected communities can thus be essential for the survival of children.³⁰⁸ In the fatal case of becoming a child victim of Cluster Munitions, also those children have the right to take part in the cultural life and recreational, leisure and sporting activities at all levels,³⁰⁹ which is important for their well-being, own identity, inclusion and recovery.³¹⁰ The promotion of multiculturalism, respect and diversity by a CRBA to the implementation of the CCM would contribute to a better understanding of the needs and vulnerabilities of children with disabilities by enabling them to express themselves, to

³⁰⁴ Art. 26 (1)(a)(b) CRPD, *op. cit.*

³⁰⁵ Breitegger (a), 2012, pp. 110-112.

³⁰⁶ Garzón et al., 2014, pp. 19-21.

³⁰⁷ Art. 31 (1) CRC, *op. cit.*

³⁰⁸ Breitegger (a), 2012, pp. 102-103.

³⁰⁹ Art. 30 CRPD, *op.cit.*

³¹⁰ Breitegger (a), 2012, pp. 111-112.

use their capacities and to deal with their situation. Therefore, culture, recreation and sport are vital for the development of children and their personalities which has to be provided by the SP, when applying a CRBA, through the establishment of appropriate, protected and accessible infrastructure.³¹¹

4.3.1.9 Reporting and Monitoring

With the aim to analyse the impact of measures taken by the SP when implementing the CCM on the realisation of the full enjoyment of children's rights, it is a prerequisite to undertake monitoring, reporting as well as impact assessments. Through reporting and monitoring, SP to the CCM can also compare and exchange information, best practices, evaluation results as well as lessons learnt regarding all issues concerning children and seek international support. According to Article 7 CCM, SP in particular are obliged to report on national implementation measures, measures regarding risk education and victim assistance as well as on relevant information concerning the size, location and number of the submunitions. However, many SP do not fulfil their regular reporting obligations and do not provide consistent and qualitative information on the implementation efforts concerning victim assistance.³¹² Those transparency measures, already covered before, are key measures for an effective CRBA. It is vital to analyse the impact of Cluster Munitions on the rights of the child, to identify their rights and the responsibilities of the state and other stakeholder in order to adjust all implementation measures to the needs and vulnerabilities of the child, to support them claiming their rights and to hold SP accountable. Through monitoring, the effectiveness of the implementation measures in terms of the fulfilment of children's rights can be evaluated and adapted to the changing needs of children. In this context, the four general principles of the CRC have to be taken into account in all phases of the reporting and monitoring process.³¹³

³¹¹ Garzón et al., 2014, pp. 23-25.

³¹² Convention on Cluster Munitions, Transparency Measures, at <http://www.clusterconvention.org/the-convention/operative-commitments/transparency-measures/> (consulted on 8 July 2015).

³¹³ Save the Children, Child Rights Programming, 2005, pp. 43-45.

4.3.1.10 International cooperation

The obligations deriving from the CCM are not only about clearance of the contaminated land and destruction of stockpiles. On the contrary, they touch upon various issues and sectors such as disarmament, humanitarian action, human rights and development. Therefore, the implementation of the obligations and especially the duty to provide adequate victim assistance require coordination and cooperation among all stakeholders at all levels. When it comes to victim assistance and inclusion of persons with disabilities and children in particular, almost all areas of life are concerned, which presuppose coordination at all ministerial levels of a SP as well as the engagement and collaboration with relevant civil society organisations. In addition to the primary obligation of the state to fulfil its duties, Article 6 CCM provides the possibility to seek and to receive assistance from the international community, in particular in the area of victim assistance. Each SP in the position to do so is obliged to provide victim assistance through various means such as the UN system, international, regional or national organisations, the ICRC, NGOs or on a bilateral basis.³¹⁴ Hence, a comprehensive CRBA needs to be holistic, integrated and inclusive. Only through the engagement and the cooperation of all sectors at regional, national and international levels it is possible to extensively realise the rights of the child, to guarantee their right to survive and to develop and include all children, in particular those with disabilities, in all sectors such as education, health, rehabilitation and nutrition. Such an approach also demands the empowerment of children in all areas concerning them as well as the reduction of barriers in all areas of their daily life.³¹⁵ In this context, Article 6 CCM meets Article 2 of the ICESCR when it comes to international cooperation, which is a means to progressively realise economic, social and cultural rights.

Before dealing with the main areas of action vital for SP in order to implement the CCM while applying a CRBA approach, the main elements of the approach can be summarised as follows:

³¹⁴ Art. 6 (7) CCM, *op. cit.*

³¹⁵ UNICEF, *Guidance on Child-focused Victim Assistance*, chapter 4, 2014, pp. 25-28.

CRBA to the implementation of the CCM

SP to the CCM, the CRC and the CRPD have binding legal and moral obligations towards children

All actions taken by the SP in order to implement the CCM should be guided by the four foundational principles of the CRC:

- SP should ensure the well-being of children by establishing a protective environment, able to safeguard them from harm and to guarantee their right to life, survival and development
- All children should be protected against all forms of discrimination which requires the inclusion of all children as well as the response to the differences and specific needs of the most marginalised ones
- SP should assess and evaluate the impact of their actions in view of the best interest of the child and the full enjoyment of all children's rights
- SP should acknowledge the opinion of children, allow for their participation in all areas concerning them and should empower children to participate and to claim their rights

A CRBA to the implementation of the CCM should rely on the broader human rights system in general and the CCM, the CRC, the CRPD and IHL in particular

It has to be considered that different age and gender groups with different needs and vulnerabilities have to be addressed accordingly in a differentiated way

Victim Assistance has to be child sensitive and shall take into account the specific needs of children. Reintegration into the society and rehabilitation in all areas of the daily life are important to achieve children's inclusion, autonomy, recovery and participation, facilitating the realisation of their rights, their well-being, survival and comprehensive development

Promotion of children's right to take part in the cultural life and recreational, leisure and sporting activities is essential for their well-being, development, recovery and improvement of capacities

Reporting and monitoring are key aspects in identifying the impacts of Cluster Munitions on children and in adjusting all implementation measures to the needs and vulnerabilities of the child

A comprehensive CRBA needs to be holistic, integrated and inclusive, which requires assistance and cooperation of all relevant stakeholders at regional, national and international level

Table 2: Elements of a CRBA to the implementation of the CCM

4.4 Areas of Action

4.4.1 Preventive Measures

When it comes to the use of Cluster Munitions, landmines or other explosive devices, the best way to guarantee children's rights is to prevent them to become victims of these weapons. Therefore, states and other relevant stakeholders should establish child protection programmes in order to avoid death and disabilities caused by Cluster Munitions. An integral part of such programmes is the protection of victimised children from other harm such as discrimination, exclusion or abuse. As can be seen from the numbers and impacts illustrated in chapter two of the present thesis, states often fail to establish appropriate protection programmes and to prevent children becoming victims of Cluster Munitions. Through awareness-raising and highlighting protection failures, governments and civil society may be prompted to take appropriate action, although one of the biggest challenges in this regard still remains the lack of data necessary for the assessment of the measures already taken. In case of armed conflicts, the protection failures and the special vulnerability of children are even more obvious and pervasive.³¹⁶ Hence, during these times and in the transitional phase, child protection needs to be strengthened and a protective environment needs to be established, as, for instance, suggested by the UNICEF child protection strategy, which defines crucial elements of such an approach.³¹⁷

Regarding Cluster Munitions, preventive measures have to be taken primarily in the area of risk reduction and education. According to Article 4 (2)(c) and (e) CCM, SP are obliged to mark and fence the contaminated areas and to conduct risk reduction education. Fencing and other techniques to prevent children to enter contaminated areas is crucial to ensure their well-being, especially because clearance is often not undertaken immediately due to the high expenses, the slow pace of clearance activities or impracticability for the reason of natural conditions. Ways how to conduct warning, marking and fencing, which has to be visible, legible, durable and resistant to

³¹⁶ Landgren, 2005, pp. 221-226.

³¹⁷ See Economic and Social Council, UNICEF Child Protection Strategy, 2008.

environmental effects,³¹⁸ are already suggested by the IMAS or guides elaborated by the Geneva International Centre for Humanitarian Demining (GICHD).³¹⁹ Regarding children, those conducting the marking have to take into account that, in particular, young children are often not able to read warning signs and that therefore the establishment of physical barriers is more suitable than just marking the area. Moreover, measures have to be taken to prevent locals and their children to cultivate their land which is, however, often essential for their survival.³²⁰

Marking and fencing goes hand in hand with risk education. Whereas warning the population of the existence of Cluster Munitions has to be carried out immediately after an attack, risk reduction education has to be a sustainable and long-term process, addressing the needs and vulnerabilities of the affected communities. In this regard, national and international standards such as the IMAS also have to be taken into account.³²¹ In the context of risk education, the IMAS identified three main elements which are public information dissemination, education and training and the establishment of a community mine action liaison;³²² all of which should be incorporated in the broader Cluster Muniton activities alongside the promotion of behavioural change of the affected community.³²³

4.4.2 Emergency Medical Care

As already described in chapter two, the consequences of children becoming victims of Cluster Munitions are enormous especially because of the proximity of vital organs to the explosion. The loss of limbs, impairments or even death is often the result. In the first hours after the incident immediate first aid and emergency medical care are therefore crucial to save the life of an affected child. First of all it has to be taken out of

³¹⁸ Art. 4 (2)(c) CCM, *op. cit.*

³¹⁹ See GICHD, *A Guide to Marking and Fencing in Mine Action Programmes*, 2008 and IMAS 08.40, *Marking mine and UXO hazards*, Second Edition, 2003.

³²⁰ GICHD, *A Guide to Cluster Munitions*, 2009, pp. 74-78.

³²¹ Art. 4 (3) CCM, *op. cit.*

³²² GICHD, *A Guide to Cluster Munitions*, 2009, pp. 79-81.

³²³ Gro & Casey-Maslen, 2010, pp. 316-317.

the contaminated area, secondly, the often severe bleeding has to be stopped, thirdly, antibiotics need to be administered in order to prevent infections and fourthly, the child has to be brought to a health facility immediately.³²⁴ The main challenges in this regard are that such incidences often occur in remote areas which do not dispose of the necessary medical facilities, transport systems, trained first responders who know how to react to the severe injuries of children as well as the required medical equipment. Long transportation to adequate health facilities and poor first aid increase the probability of death and permanent disabilities.³²⁵ Once arrived in the hospital, children usually have to undergo several surgeries, skin grafts and trauma care, which require sufficient blood and antibiotic stocks³²⁶ as well as skilled medical personnel able to address the complex injuries of children. When applying a CRBA to the implementation of the CCM, SP should take care of the provision of adequate first aid and emergency care in order to ensure the survival of children and fewer permanent disabilities.

4.4.3 Hospital Care

Following a Cluster Munitions incident, victims frequently need medical care for a longer period of time. Due to amputations, multiple surgeries and shrapnel persisting in their little bodies,³²⁷ children need to remain in medical facilities to recover from their injuries and to obtain physiotherapy, pain management and corrective surgeries,³²⁸ adapted to their specific needs. Many of the hospitals in Cluster Munitions affected areas lack sufficient medical services, for instance laboratories and radiology, necessary equipment, pharmaceuticals or material essential for the best treatment of children, enabling them to rehabilitate.³²⁹ Moreover, medical professionals and paediatric specialists,³³⁰ skilled in dealing with the severe injuries of children caused by Cluster

³²⁴ GICHD, *A Guide to Cluster Munitions*, 2009, p. 89.

³²⁵ ICRC, *Caring for Landmine victims*, 2005, p. 6.

³²⁶ GICHD, *A Guide to Cluster Munitions*, 2009, p. 89.

³²⁷ *Idem.*, p. 89.

³²⁸ UNICEF, *Guidance on Child-focused Victim Assistance*, section 5.2., 2014, p. 6.

³²⁹ ICRC, *Caring for Landmine victims*, 2005, p. 7.

³³⁰ Garzón et al., 2014, p. 19.

Munitions, able to apply child specific amputation, surgical and eyesight-saving³³¹ techniques, are habitually missing.³³² A further challenge in this regard is the equal access of boys and girls to prolonged medical care. As a result of cultural and financial reasons girls and young women are regularly discriminated against boys, which has to be taken into account by the medical staff.³³³ Given the fact that the necessary infrastructure and means, such as child friendly accommodation, allowing them to be accompanied by their caregivers,³³⁴ are often not available, adequate treatment of child victims of Cluster Munitions is rarely the case which requires measures to be taken by the SP addressing those gaps and the specific vulnerabilities of children.³³⁵

4.4.4 Physical Rehabilitation

Physical rehabilitation is a prerequisite for integration, inclusion, participation and rebuilding the life of the victim. One aim of physical rehabilitation is to provide Cluster Muniton victims with physiotherapy and the appliances he or she needs to regain mobility such as prostheses and orthoses in the case of the loss or malfunctioning of a limb, visual and hearing devices or orthopaedic devices for example wheelchairs or crutches. Part of the rehabilitation is also the adaptation of the assistive devices as well as replacement and repair, guidance on how to use them as well as therapy. Especially children are in need of continuing physical rehabilitation due to their ongoing growth which requires, for instance, the fitting with prostheses every 6 to 12 months. Again, facilities providing such physical rehabilitation are often lacking, are only located in bigger cities or are missing child specialised rehabilitative professionals. The access to such services is often impossible as a result of insecurity, discrimination, cultural reasons, lack of financial resources or transport costs.³³⁶ The right to attain the maximum independence possible is not only prescribed by Article 26 CRPD, it is also

³³¹ UNICEF, Guidance on Child-focused Victim Assistance, section 5.2., 2014, p. 7.

³³² ICRC, Caring for Landmine victims, 2005, p. 7.

³³³ UNICEF, Guidance on Child-focused Victim Assistance, section 5.2., 2014, p. 4.

³³⁴ Idem., 2014, p. 8.

³³⁵ Garzón et al., 2014, p. 19.

³³⁶ ICRC, Caring for Landmine victims, 2005, pp. 8-9.

vital for the well-being of children with disabilities and the enjoyment of their rights in all aspects of daily life. Therefore, they need the support of their families and the community which usually have to make modifications to their homes and need to be trained in caring for children with disabilities. Such training can be provided by community-based rehabilitation staff, able to instruct caregivers, to adapt the assistive devices and to support child-friendly rehabilitation.³³⁷

4.4.5 Psychological Support

Due to the impacts of Cluster Munitions, children suffer not only from physical traumas but also from psychological traumas and mental disorders, which also affect their families who have to cope with the new situation. The reactions to horrible experiences, such as the loss of a limb, vary from person to person and among age groups and usually evoke a variety of feelings. Exclusion, discrimination, abuses and stigmatisation of persons with disabilities often create further mental stress which especially concern women and girls. Therefore, psychological care and psychosocial support tend to prevent and to deal with psychological traumas and to maintain and promote the mental well-being of victims. During this process, everyone in the closer environment needs to be addressed in order to be able to deal with the new situation and to support the victim. First, immediate psychological support has to be provided, followed by ongoing psychosocial care. Also, in this case, medical staff able to cope with psychological child specific needs and feelings is required but often missing. Depending on their age and gender, children frequently suffer different fears and anxieties which need to be addressed by those providing psychosocial support. Ways of promoting the well-being of children are peer support, child-to-child programmes and empowerment. Trained peer supporters, who are often themselves victims of Cluster Munitions, can be a driving force in promoting inclusion, the recovery of the child, the rebuilding of self-esteem and empowerment.³³⁸ Also SP and NGOs adopting victim assistance measures

³³⁷ UNICEF, Guidance on Child-focused Victim Assistance, section 5.3., 2014, pp. 4-9.

³³⁸ UNICEF, Guidance on Child-focused Victim Assistance, section 5.4., 2014, pp. 4-10.

should always address the psychological needs of children with disabilities in their programmes.³³⁹

4.4.6 Socioeconomic Reintegration

Socioeconomic reintegration and inclusion are an essential part of rebuilding the life of a victim of Cluster Munitions. Through the adoption of the so-called twin-track approach a) the equality of persons with disabilities in all areas of daily life should be realized by removing environmental hurdles, such as physical, communicational or behavioural barriers, in order to allow for equal access to services and full participation and b) their needs and vulnerabilities should be addressed by strengthening their capacities through empowerment. Both can be achieved by way of mainstreaming disabilities in all activities and programmes taken by the SP and by taking specific measures targeting the needs of children with disabilities.^{340, 341} A life in dignity of children with disabilities is only possible if they are properly included in all activities of the society, including culture, leisure and sporting events. Therefore, equal access for all children to inclusive education, defined as the delivery of education at all levels which targets the specific and diverse needs of all children, as well as economic inclusion, meaning to become a productive member of society through the active participation and contribution to the economic life of the family and the community, and social protection, guaranteeing the full enjoyment of the rights of the child through equal access to all services, is a must. In this regard, vocational training, the support and the acceptance of the family and community, psychosocial care, peer support and the establishment of employment and skills development programmes are mechanisms to guarantee the well-being, survival and development of children with disabilities.^{342, 343}

³³⁹ Von der Assen et al., 2010, pp. 32-36.

³⁴⁰ UNICEF, Guidance on Child-focused Victim Assistance, chapter 4, 2014, p. 25.

³⁴¹ Von der Assen et al., 2010, p. 34.

³⁴² ICRC, Caring for Landmine victims, 2005, p. 9.

³⁴³ UNICEF, Guidance on Child-focused Victim Assistance, section 5.5, 2014, pp. 4-7.

4.4.7 Legislation and policies

In order to properly implement the CCM and the obligations of Article 5 CCM regarding victim assistance in particular, SP have to adopt corresponding laws and policies, aiming at the avoidance of discrimination and the protection of the rights of Cluster Munition victims, especially of children with disabilities. Therefore, child victims must be provided with equal access to all relevant services and facilities, above all to health and rehabilitation services, education, social and employment programmes as well as cultural and sporting events. This can only be achieved through data collection and victim surveillance concerning children affected by Cluster Munitions, the provision of public services also in rural and remote areas, the strengthening of the national health care and rehabilitation system, the step-up of resources and means as well as child focused training of medical professionals and staff on community level, so as to address the needs of children with disabilities in all measures taken by the SP.³⁴⁴ Legislative and policy frameworks are vital in order to claim the rights of child victims and to hold states accountable for not meeting their obligations. In this regard, advocacy, awareness-raising and individual complaints to Courts or Ombudspersons can be important tools to put governments under pressure to adopt and implement disability laws, action plans or other child victim focused strategies and policies. Furthermore, age and gender sensitive equal access to justice, allowing victims to exercise remedies in case of violation of their rights, as well as the participation, engagement and contribution of child victims in the decision making process on topics influencing their lives, are key in establishing an inclusive society, allowing for the full enjoyment of all human rights of children with disabilities.³⁴⁵

4.4.8 Training and Capacity Building

Professionals specifically trained in dealing with the impacts of Cluster Munitions on children and in how to deal with the consequences of those weapons as well as in how

³⁴⁴ ICRC, *Caring for Landmine victims*, 2005, p. 10.

³⁴⁵ UNICEF, *Guidance on Child-focused Victim Assistance*, section 5.6, 2014, pp. 4-6.

to address the specific needs of children with disabilities are required to support Cluster Munition victims to rebuild their lives. Moreover, it is important to teach families and communities how to include disabled children in the society and to advise law makers and service providers how to target the challenges disabled children face.³⁴⁶ Their role is especially important in the area of first aid and emergency care. Through adequate and prompt response to a Cluster Munition incident, the lives of many children could be saved and permanent disabilities could be prevented. Therefore, skilled staff has to be present at a local level, able to train families and communities on how to provide first aid and to make them aware of the dangers Cluster Munitions pose.³⁴⁷ In the context of victim assistance, the participation and engagement of all relevant stakeholders as well as professionals at a national and international level contributes to the outcome of more effective child-focused victim assistance programmes. Furthermore, results-based monitoring as well as monitoring and evaluation in general is needed to assess the situation on the ground, to adopt and to review relying on facts age and gender sensitive actions addressing the needs of child victims and to measure the results and the progress of the implementation process on the basis of targets and aims.³⁴⁸

³⁴⁶ UNICEF, *Guidance on Child-focused Victim Assistance*, chapter 4, 2014, p. 28.

³⁴⁷ Garzón et al., 2014, p. 26.

³⁴⁸ UNICEF, *Guidance on Child-focused Victim Assistance*, chapter 4, 2014, pp. 28-29.

Conclusions

Although the use of Cluster Munitions is prohibited since the adoption of the Convention on Cluster Munitions in 2008, states still do not take the impacts those weapons cause seriously. Just recently, Human Rights Watch confirmed the use of Cluster Munitions by the Saudi-led coalition in Yemen in April 2015. There is evidence that the weapons used in the airstrikes were supplied by the United States.³⁴⁹ Similarly, Sudan used Cluster Munitions this year, targeting villages and ignoring the implications of their action.³⁵⁰ Even though neither the United States nor Saudi Arabia or Sudan ratified the Convention, states should acknowledge the wide-spread impact and the long-lasting consequences for people, communities and countries resulting from the use of Cluster Munitions, dealt with in chapter two of the thesis. Moreover, the use of more advanced technologies, often used as an excuse, is not able to solve the humanitarian problem Cluster Munitions induce. Therefore, states should refrain from the use as well as the transfer of those weapons in all circumstances.³⁵¹

By ratifying the Cluster Munitions Convention, State Parties are not only advised not to use, develop, produce, otherwise acquire, stockpile, retain or transfer Cluster Munitions, but are even legally obliged to do so. Similarly, they have to provide victim assistance, to undertake clearance and risk reduction education, to destroy stockpiles and to cooperate on an international level in fulfilling their duties. In the same way legal obligations are also deriving from international humanitarian and human rights law in general and, in this context, from the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities in particular. Both spheres of law are in an equal manner aimed at the protection of human beings, their lives, health as

³⁴⁹ Human Rights Watch, Yemen: Saudi-Led Airstrikes Used Cluster Munitions, at <http://www.hrw.org/news/2015/05/03/yemen-saudi-led-airstrikes-used-cluster-munitions> (consulted on 8 July 2015).

³⁵⁰ Human Rights Watch, Sudan: Cluster Bombs Used in Nuba Mountains, at <http://www.hrw.org/news/2015/04/15/sudan-cluster-bombs-used-nuba-mountains> (consulted on 8 July 2015).

³⁵¹ Borrie & Cave, 2006, pp. 10-12.

well as their dignity. Whereas in the area of victim assistance states have primarily to drawn upon human rights law, humanitarian and human rights law are comparably relevant when it comes to evaluating the legality of the use of Cluster Munitions outside the specific CCM framework, clearance and risk reduction education.³⁵²

Even though a child rights-based approach is, according to the description provided here, *just* a conceptual framework, states enter into legally binding obligations when expressing their consent to be bound by international treaties. Therefore, the application of most of the aspects of this approach in order to implement the Convention on Cluster Munitions, putting children at the centre of all considerations in this regard, but which are not specifically expressed by the CCM, such as the age and gender sensitive victim assistance, are *optional* but extremely important due to the high numbers of children affected by Cluster Munitions. On the other hand, the implementation of the overall legally binding responsibilities and the adoption of actions and measures in this effect are *mandatory* by reason of the entitlement of people to rights and the duties of states to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights of the child.³⁵³ Especially in the case of victim assistance and risk education, the lack of resources cannot be used as an excuse for not complying with agreed obligations, as can be seen from General Comment No. 13 of the Committee of the Rights of the Child.³⁵⁴ Based on the responsibilities in the area of children's rights, the European Union and the United Nations Children's Fund have already adopted an approach to incorporate the rights of the child into development cooperation.³⁵⁵ From there, it is only a small step to apply such an approach in other areas such as disarmament law as well. Therefore, the realisation of children's rights could be, *inter alia*, achieved through the application of this child rights-based approach whose elements and principles elaborated on before are able to contribute to a better implementation of the Cluster Munitions Convention and to guide decision makers when adopting corresponding measures, actions, programmes, policies and laws. These principles and elements constitute a minimum standard of conduct and lay emphasis on

³⁵² Breitegger (a), 2012, pp. 90-92.

³⁵³ Art. 4 CRC, *op. cit.*

³⁵⁴ Committee on the Rights of the Child, General Comment No. 13, 2011, para. 73.

³⁵⁵ UNICEF, EU-UNICEF Child Rights Toolkit, 2014, p. 1.

an obligation of conduct based on international humanitarian and human rights law treaties. Hence, by means of a child rights-based approach not only the quality of the implementation measures could be enhanced but also children's rights could be guaranteed in a broader way.³⁵⁶

However, the rights of the child are unfortunately too often disregarded by states and other relevant actors despite the almost universal ratification of the Child Rights Convention and the acknowledgment of children as one of the most vulnerable groups of the society. Thus, states have to respect, protect and fulfil their rights also and especially during armed conflicts and post-conflict settings as well as in the field of disarmament law. Consequently, drawing conclusions from the information provided in this thesis, I want to offer recommendations to the State Parties to the Convention on Cluster Munitions concerning the main areas of action discussed in chapter four:

Preventive Measures:

Recommendation 1: Warning of children and their families of the existence of Cluster Munitions should be undertaken immediately after attacks in an easy and child friendly language so as to make the danger known to children of all age groups.

Recommendation 2: Warning signs understandable for children by using symbols and child's language should be installed as soon as possible. Physical barriers should be established if many young children who are not aware of the hazards live next to contaminated areas.

Recommendation 3: Sustainable education of the danger of Cluster Munitions should be conducted by child professionals who are able to make them aware of the hazards.

Recommendation 4: Needs and vulnerabilities of children and their families should be addressed in order to avoid them entering contaminated land or to do business with Cluster Munitions remnants.

Emergency Medical Care:

³⁵⁶ Haugen, 2011, pp. 423-444.

Recommendation 5: All children should have equal access to qualitative and appropriate first aid and medical care which are addressing their specific needs.

Recommendation 6: The local community should be trained in responding to the severe injuries of children caused by Cluster Munitions. Therefore, sufficient medical equipment and antibiotics should be provided.

Recommendation 7: Health facilities and professionals who are able to treat the complex traumatic injuries of children should be available also in remote areas. Transport to hospitals should be carried out as soon as possible after the incident and should not put financial pressure on the families of the victim.³⁵⁷

Recommendation 8: Actions taken by State Parties should incorporate the assistance of child victims into their broader national health systems.³⁵⁸

Hospital Care:

Recommendation 9: Medical facilities should be provided with the necessary equipment, services, resources and materials necessary for the adequate treatment of child victims.

Recommendation 10: Hospital staff and surgeons should be instructed in how to deal with the specific needs of children and in how to treat their specific injuries through training of child specific medical techniques and sensitization.

Recommendation 11: All children should have equal access to prolonged medical care and corrective surgeries through their life-cycle and should be able to enjoy child friendly care.

Physical Rehabilitation:

Recommendation 12: All children should have equal access to community based or institutional child friendly, age and gender sensitive physical rehabilitation services which are essential for the fulfilment of their rights, inclusion and participation.

³⁵⁷ UNICEF, Guidance on Child-focused Victim Assistance, section 5.2., 2014, pp. 4-9.

³⁵⁸ ICRC, Caring for Landmine victims, 2005, p. 5.

Recommendation 13: Necessary, good quality assistive devices should be provided for all children without discrimination and should be adapted to their needs on a regular basis.

Recommendation 14: Families of the child victim, communities and professionals should be trained in supporting and promoting child friendly, age and gender sensitive rehabilitation.³⁵⁹

Psychological Support:

Recommendation 15: All children and their families should have equal access to age and gender sensitive psychological care and psychosocial support immediately following the Cluster Munition incident, allowing them to deal with their new situation and their feelings.

Recommendation 16: The capacities of families, friends and the community should be strengthened in order to provide the necessary support for the victim and to establish a protective environment, enabling children to recover and to develop.

Recommendation 17: Trained medical staff, mental health as well as field workers and others working with children should address their specific psychosocial needs through peer support, awareness-raising, empowerment and the inclusion of disabled children in cultural and sporting activities.

Socioeconomic Reintegration:

Recommendation 18: All children should have equal access to inclusive and good quality education and learning possibilities throughout their life-cycle.

Recommendation 19: The acceptance and support of the family and community for children with disabilities should be strengthened in order to allow them a life in dignity and to participate in and contribute to all activities of the society.

³⁵⁹ UNICEF, Guidance on Child-focused Victim Assistance, section 5.3., 2014, pp. 4-9.

Recommendation 20: State Parties should create opportunities and adopt measures targeting the specific need of children with disabilities, in particular in terms of education and employment, ensuring their full inclusion as active members of society.

Recommendation 21: State Parties should take measures ensuring the social protection and the enjoyment of the fundamental rights of the child, through protecting children from harms such as abuse, malnutrition, poverty, violence, discrimination, marginalisation, neglect and stigmatisation.³⁶⁰

Legislation and Policies:

Recommendation 22: State Parties should address the needs and vulnerabilities of child victims of Cluster Munitions in their laws and policies, aiming at the respect and the protection of the rights of the child.

Recommendation 23: Children with disabilities should have equal access to justice, taking into account their age, gender and needs by providing appropriate legal support, and should be empowered to participate in all stages of the decision making process regarding all issues concerning their lives.

Recommendation 24: Advocacy campaigns, supporting the realisation of the rights of the child, awareness-raising programmes familiarizing victims and their families with their rights and their possibilities to have recourse to remedies, as well as national and international monitoring and reporting mechanisms should contribute to the creation of an inclusive society through the adoption of laws and policies.³⁶¹

Training and Capacity Building:

Recommendation 25: Staff working with disabled children in all relevant areas should be trained in how to address the specific needs and vulnerabilities of child victims of Cluster Munitions in an age and gender sensitive way.

Recommendation 26: Skilled professionals should be present at all levels, supporting and instructing victims, families, communities, service providers and policy makers.

³⁶⁰ UNICEF, Guidance on Child-focused Victim Assistance, section 5.5, 2014, pp. 4-7.

³⁶¹ UNICEF, Guidance on Child-focused Victim Assistance, section 5.6, 2014, pp. 4-9.

Recommendation 27: Participation of all stakeholders, monitoring, evaluation and reporting should contribute to effective and successful child victim assistance measures taken by the State Parties.

Furthermore, having in mind the adoption of a new Action Plan for the implementation of the Convention on Cluster Munitions at the first Review Conference in Dubrovnik, Croatia in September 2015, some of the actions in the area of victim assistance and risk education applying a child rights-based approach and taking into account the severe impacts of children affected by Cluster Munitions could be read as follows:

Action 1: As soon as areas under jurisdiction or control are known to be contaminated by Cluster Munition remnants, take all feasible measures to especially prevent child casualties by establishing physical barriers and by installing warning signs understandable for children.

Action 2: Ensure that affected communities and in particular children, children with disabilities and their caregivers are informed of, and included in, the development of national clearance plans, planning and prioritisation of clearance activities, land release and all other areas concerning them, by allowing for their participation in a meaningful, gender and age sensitive manner and by empowering them to claim their rights.

Action 3: Provide sustainable, age and gender sensitive risk education conducted by child professionals which is holistic, integrated and inclusive and takes into account the four foundational principles of the Convention on the Rights of the Child.

Action 4: Review and strengthen the availability, accessibility and quality of services especially in remote and rural areas regarding emergency and hospital care, physical rehabilitation, psychological and psychosocial support, economic and social inclusion, and guarantee access to equal, child friendly, age and gender sensitive services without discrimination addressing the changing needs of child victims.

Action 5: Raise awareness among cluster munition victims about their rights and available services, as well as within government authorities, service providers and the

communities to foster respect for the rights and dignity of persons with disabilities, including child victims. Furthermore, promote, in particular, the reintegration of children into the society and their rehabilitation in all areas of the daily life as well as their right to take part in the cultural life and recreational, leisure and sporting activities.

Action 6: Implement existing international standards, guidelines and recommendations in the areas of emergency and medical care, rehabilitation, psychological and psychosocial support as well as social and economic inclusion. This can be achieved, inter alia, through education, training and employment incentive programmes for children with disabilities as well as through the equipment of medical facilities with the necessary resources and materials necessary for the adequate treatment of child victims.

Action 7: Strengthen capacities through the training of hospital personnel, surgeons and staff at all levels engaging with disabled children in all relevant areas, enabling them to address the specific needs of child victims in an age and gender sensitive way.

Action 8: Involve children and their representative organisations in the development, implementation, monitoring and reporting of efforts to fulfil obligations under the Convention on Cluster Munitions and include them in the developing process of comprehensive legislative, administrative or other implementing measures.

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